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In the United States District Court for the Eastern District of Louisiana, New Orleans Division
No. 30439

CRIMINAL DOCKET DIVISION A

Title of case	Attorneys
THE UNITED STATES vs. RAYMOND JOSEPH DUVERNAY *INDICTMENT* FAILURE TO COMPLY WITH SELECTIVE SERVICE DIRECTIVES (Vio: 50 App. USC 462) 1 Count	*For U.S.:* Louis B. Merhige Asst. U.S. Attorney Frederick W. Veters Asst. U.S. Attorney *For Defendant:* Bruce C. Waltzer, Trial Atty. SMITH, WALTZER & JONES 1006 Baronne Building By: Benjamin E. Smith, T. A. Tel.: 525-0606

Statistical Record	Costs	Date	Name or Receipt No.	Rec.	Disb.
J.S. 2 mailed J.S. 3 mailed Violation Title Sec.	Clerk Marshal Docket fee	9-6-66 9-7-66	Smith, Waltzer CD #19	5.00	(Appeal) 5.00

Date 1966	Proceedings	
6/16/66	Flg. INDICTMENT	1
6/22/66	Entg. ARRAIGNMENT. Plea of NOT GUILTY entered. Deft. GRANTED ten (10) days within which to file pleadings. ORDERED by the Court that deft. be placed in custody until bond is made. Ent. 6/27/66.	2
7/27/66	Flg. motion of deft., to quash Bill of Indictment; notice of motion fixed for hearing on Wed., Aug. 3, 1966, at 2:00 P.M.; memorandum in support of mtn., annexed.	3
7/29/66	Flg. motion of U.S.A. for, and ORDER (H.W.C., 7/29/66) that the hearing on deft.'s motion to quash bill of indictment be CONTINUED from Wed., August 3, 1966, to Wed., Aug. 10, 1966, at 2:00 P.M. Ent. 8/1/66. Issg. notice.	4
8/10/66	Flg. Government's motion in opposition of defendant's motion to quash the indictment; memorandum in opposition to motion to quash, annexed.	5
8/10/66	Entg. HEARING, on motion of deft. to quash bill of indictment and to dismiss; and on motion of the U.S. in opposition to deft.'s motion to quash the indictment. Argument. Witness called and testimony heard on behalf of deft. ORDERED by the Court that motion to quash and to dismiss is DENIED. FURTHER ORDERED that trial is SET for Tues., Aug. 30, 1966, at 10:00 A.M. Ent. 8/18/66. Issg. notice.	8
8/ 6/66	Flg. motion of deft., for new trial; memorandum annexed; Notice of motion fixed for hearing on Wed., Sept. 7, 1966, at 2:00 P.M. En	12
8/30/66	Entg. cause came on this day for trial, by the jury. Counsel for deft. requested that the jury panel be excluded from Courtroom so that preliminary matter might be taken up with the Court, same being GRANTED by the Court. Witnesses called and testimony heard. Jurors called, sworn. Witnesses called and testimony heard. Argument. Verdict of the jury, GUILTY. The Court ORDERED that the verdict be recorded. On oral motion of counsel for deft., the Court GRANTED a CONTINUANCE for sentencing. ORDERED by the Court that new bond of deft. be set in amount of $5,000.00 and that deft. not be allowed to sign his own bond. Deft. was remanded. Ent. 9/7/66.	13
9/ 6/66	Flg. Notice of Appeal, by defendant, from the verdict and judgment of August 30, 1966.	14
9/ 7/66	Flg. & Entg. Judgment and Commitment. (Defendant committed to custody of the Atty. General or his authorized representative for imprisonment for five (5) years). Sgd. (H.W.C.) 9/7/66. Ent. 9/9/66.	15
	Issg. copies to U.S. Marshal and U.S. Atty.	

In the United States District Court for the Eastern District of Louisiana, New Orleans Division

[File endorsement omitted]

Docket No. 30439
VIO: 50 App. USC 462

UNITED STATES OF AMERICA

vs.

RAYMOND JOSEPH DUVERNAY

INDICTMENT FOR FAILURE TO COMPLY WITH SELECTIVE SERVICE DIRECTIVES—FILED JUNE 16, 1966

The Grand Jury charges:

On or about the 20th day of May, 1966, in the New Orleans Division of the Eastern District of Louisiana, RAYMOND JOSEPH DUVERNAY wilfully and knowingly did fail and neglect to perform a duty required of him under and in the execution of the Universal Military Training and Service Act and the rules, regulations, and directions duly made pursuant thereto, in that he did fail, neglect, and refuse to comply with an order of his local board to submit to induction into the Armed Forces of the United States; all in violation of 50 App. USC 462.

A True Bill:

T. R. KENNEY,
Foreman.

/S/ LOUIS B. MERHIGE,
Assistant United States Attorney

We the jury find the defendant Guilty.

JOHN F. CADO,
Foreman,
August 30, 1966.

MINUTE ENTRY:
June 22, 1966
CHRISTENBERRY, J.

Division "A"
No. 30439
Criminal

UNITED STATES OF AMERICA
versus
RAYMOND JOSEPH DUVERNAY

This cause came on this day for Arraignment.

PRESENT: Louis B. Merhige, Esq.
Assistant U.S. Attorney
Bruce C. Waltzer, Esq.
Attorney for Defendant

Defendant, Raymond Joseph Duvernay, waived reading of Indictment, and entered a plea of NOT GUILTY.

Defendant Duvernay was granted ten days within which to file pleadings.

IT IS ORDERED BY THE COURT that defendant be placed in custody until bond is made.

In the United States District Court, Eastern Division
Louisiana, New Orleans Division

Docket No. 30439 Division "A"

[Title omitted in printing]

MOTION TO QUASH BILL OF INDICTMENT—FILED JULY 27, 1966

And now into court through undersigned counsel comes the defendant herein, Raymond Joseph DuVernay and in answer to the Bill of Indictment brought against him seeks to quash said bill and in support thereof avers that:

1) Said Bill of Indictment seeks to charge this defendant with a violation of the Universal Military Training and Service Act of 1948 (50 App. USC § 462) which charge is an unconstitutional and arbitrary application of said act, sought at a time when:

a) The United States is not presently in a state of war;

b) The induction of the defendant into the armed forces would require that he engage, if ordered in armed conflict while this nation is not in a state of war pursuant to the Constitution of the United States;

c) Engagement in armed conflict while this nation is not in a state of war would possibly subject the defendant to prosecution as an accessory or principal for crimes described and defined by Treaties of the United States as crimes against humanity or war crimes.

d) Induction into the Armed Forces of the United States could and would require defendant, if ordered, to participate in engagement in Armed Conflict in the Southern Regrouping Zone of Vietnam as defined in Chapter I of the "Agreement on the Cessation of Hostilities in Vietnam" (July 20, 1954) which would be in violation of the Treaty of commitments of United States as contained in:

1) The Nuremberg Convention of 1946.

2) The Charter of the United Nations (June 26, 1945)

2) Said Bill of Indictment seeks to charge this Negro defendant with a violation of Sections of the Universal Military Training and Service Act of 1948 (50 App. USC § 462) insofar as defendant was selected and ordered to report for induction by a board from which members of the Negro Race have been systematically excluded and/or limited.

Wherefore defendant prays that this Bill of Indictment be dismissed and that he be discharged without date.

SMITH, WALTZER & JONES

/S/ BENJAMIN E. SMITH,

Counsel for Defendant,

1006 Baronne Bldg.

New Orleans, La.

[Certificate of service omitted in printing]

In the United States District Court for the Eastern District of Louisiana, New Orleans Division

Criminal Docket No. 30,439–A

[Title omitted in printing]

[File endorsement omitted.]

GOVERNMENT'S MOTION IN OPPOSITION OF DEFENDANT'S MOTION TO QUASH THE INDICTMENT—FILED AUGUST 10, 1966

Now into Court, through undersigned counsel, comes the Government in opposition to the defendant's Motion to Quash the pending indictment in this matter and avers that:

I. The question of the Legality of the Vietnamese action by the United States is not justifiable in this forum;

II. The Nuremberg Charter is inapplicable to the defendant's defense;

III. There has been no systematic exclusion of Negroes from Local Board 42 of the Selective Service System in Louisiana; and further, this defendant has suffered no discrimination through the application of the Universal Military Training and Services Act.

WHEREFORE, the Government prays that the defendant's Motion to Quash the said indictment be denied, and further, that this Honorable Court fix this matter for trial at its earliest convenience.

/S/ LOUIS B. MERHIGE,
Assistant United States Attorney.

[Certificate of service omitted in printing]

In the United States District Court, Eastern District of Louisiana, New Orleans Division

No. 30439 Criminal Docket Section "A"

Proceedings taken in the above numbered and titled cause on Wednesday, August 10, 1966, in open court, The Honorable Herbert W. Christenberry, Judge, presiding.

TESTIMONY OF COL. DOUGLAS C. PRITCHETT

[2] Col. DOUGLAS C. PRITCHETT, after first being duly sworn, testified as follows:

Examination by Mr. SMITH:

Q. Mr. Pritchett, what is your present occupation?

A. I am attorney-adviser for the Selective Service System in Louisiana.

Q. How long have you been the attorney-adviser for the Selective Service System?

A. About three-and-a-half years.

Q. Are you familiar with the operations of Local Board No. 42?

A. Well, I am not intimately acquainted with the operations of Board 42; I am a member of the staff of State Headquarters.

Q. How long have you been a member of the staff of State Headquarters?

[3] A. Approximately three-and-a-half years.

Q. Before that, what did you do, sir?

A. Before that I was on active duty in the Marine Corps.

Q. Now, in connection with your job as staff attorney, or chief attorney, do you have occasion to meet with members of Local Board 42?

A. I have never met with members of Local Board 42.

Q. So that if you have never met with them, you wouldn't know them, is that right?

A. That is right. I wouldn't know them.

Q. You don't know whether there are any Negroes on that Board, do you, sir?

A. I do not.

Q. You don't know if there have been any Negroes on that Board, do you?

A. I do not.

Q. The members of that Board are selected by nominations given to the President by the Governor of the State, would that be correct?

A. Regulations provide that the Governor make recommendations and the President appoints.

Q. How many members are on this Board presently?

A. Five.

Q. Do you know how many members have served as members in the past five years?

[4] A. Well, sir, I have the records that go back to 1948.

Q. That would include the past five years?

A. Yes, sir.

Q. Have you been able to determine how many members have served within the past five years?

A. Yes, sir. In the last five years, 1966 back to 1961, right?

Q. Right.

A. Well, let's put it this way. One of the present members, and I am talking about the present membership of the Board now, one of the members of that Board was appointed in 1956, one in 1962, one in 1963, one in 1965, and one in 1966.

Q. Five members in all?

A. That's five, yes, sir; that's the present membership of the Board.

Q. Right.

A. Another member was appointed back in 1957, and he went off the Board in '66. Another member was appointed in 1961. He went off in 1965. Another one was appointed in 1951. He went off in 1963. Then there were three members that were appointed back in 1948. All three of these are [5] now dead. One of them died in 1952, one in 1959, and the other in 1962.

Q. That would cover the preceding five years, is that right?

A. Yes, sir.

Q. Do you have all the names of those members?

A. Yes, sir.

Q. Do you know whether or not any of those persons were of the Negro race?

A. I do not know whether they were or not.

Q. Is there any place on their application that would show race or color in connection with the recommendation made by the Governor?

A. No, sir.

Q. Is all the information filled out on the applications before these men are appointed, to your knowledge?

A. Yes, sir.

Q. Do the applications that are filled out by the proposed inductees that are required to register with the Board contain a designation of race?

A. No, sir.

Q. There is no classification on any of these inductees' records as to whether they are of one race or another?

A. At the time they are filled out? At the time they [6] register?

Q. Yes.

A. No, the race designation of an inductee does not get into the registrant's file when he initially registers. The race desig-

nation gets into the registrant's official file, his Selective Service record, after he has been examined at the Armed Forces Examination and Separation Station to determine whether he is acceptable for service in the military.

Q. And it is following this examination that the order for induction is issued or not issued, is that right?

A. That's right.

The COURT:

Q. Until they are examined, there is no notation of race made, is that right?

A. That's right, sir.

Mr. SMITH:

Q. There is a final classification made after his physical examination, is that not true?

A. A final classification?

Q. Yes.

A. Well, there is not necessarily another classification then. It depends upon whether he has been found [7] acceptable or not acceptable, as to whether or not there is another classification immediately following.

Q. Do you mean a physical classification?

A. Well, physically, mentally, or morally.

Q. So that the final consideration comes after the physical examination, is that right?

A. Well, as I just said, not necessarily another classification following that.

Q. I said there is a final consideration after the physical examination; wouldn't there have been?

A. Yes.

The COURT:

Q. If a man is ordered to report for examination, and he passes, he is then ordered inducted, is that right?

A. That would be the next thing, Your Honor, in connection with the order in which the regulations require that they be selected.

Mr. SMITH:

Q. In connection with the names of persons that have been recommended by the various Governors of the State, do you have any records or any information as to whether they were all appointed?

A. Well, sir, I don't have that information with me, [8] if it is available. I don't know of my own knowledge about that.

Now, I do have the records of everyone who was appointed and who did serve.

Q. Did they present their commissions to the Board upon having been appointed to it by the President?

A. Upon being appointed by the President, they signed a waiver of pay and an oath of office.

Mr. SMITH. I think that's all I have to ask this witness.

The COURT. You may step down.

Mr. SMITH. Your Honor, we take the position that this Board functions as any other determinative body, much along the line of a jury, in that members of the Negro race should not be excluded from such a body, which is dealing with applicants that are Negroes, and we think it has been shown here that this has been the case with this Board.

The draft statute itself, Your Honor, states that there shall be no discrimination as to race or religion as to the selection of persons to be drafted, and here we have the case of the Draft Board being in existence for some ten or fifteen years, and with all the persons appointed by the [9] President, after being nominated by the Governor, being of the white race, which we contend is not in compliance with the due process of law under the Fifth Amendment.

The COURT. Does the government know whether all the Draft Board members are white?

Mr. MERHIGE. Your Honor, I don't know.

The COURT. I find that surprising.

Mr. MERHIGE. I might say this, Your Honor, I have inquired and been told that they have no Negro members now sitting on the Board, and they have not sat on the Board within five years.

The COURT. All right.

Mr. SMITH. If the Court please, before I brought this motion to quash the indictment, I made inquiry also, and I am prepared to back up that statement, that there has never been a Negro sit on Local Board 42, and I would like to ask the Court's indulgence in order that I might have time to file and make as [10] part of the record the necessary affidavits of proof in that connection.

The COURT. You may do that. I assumed you would want to do so.

The Court rules that your motion is without merit, and is denied. The case is set for trial for August 30.

I might say that this will not preclude your filing any affidavits you wish to file, and I might also state for the record that from what I have heard here today, I will assume, unless evidence is produced to the contrary, that none of the members of this Board are of the Negro race.

Mr. SMITH. Thank you, Your Honor.

The COURT. Court will stand recessed.

MINUTE ENTRY:
August 10, 1966
CHRISTENBERRY, J.

Division "A"

Criminal Docket No. 30439

[Title omitted in printing]

This cause came on this day for hearing on motion of defendant to quash bill of Indictment and to dismiss; and on motion of the United States in opposition to defendant's motion to quash the Indictment.

PRESENT: Louis B. Merhige, Esq.
Assistant U.S. Attorney
Benjamin E. Smith, Esq.
Attorney for Defendant

Argument.

The following witness was called and testified on behalf of the defendant:

Douglas Prichard, Sworn by Deputy Clerk.

IT IS ORDERED BY THE COURT that the motion of defendant to quash Bill of Indictment and to dismiss be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED that trial in this matter be, and the same is hereby, SET for Tuesday, August 30, 1966, at 10:00 o'clock A.M.

FREDERICK W. VETERS, Esq.

[1] In the United States District Court, Eastern District of Louisiana, New Orleans Division

Section "A"

Criminal Docket No. 30439

UNITED STATES OF AMERICA

vs.

RAYMOND JOSEPH DUVERNAY

TRANSCRIPT OF TRIAL—AUGUST 30, 1966

APPEARANCES:

LOUIS B. MERHIGE and GENE S. PALMISANO, Assistant United States Attorneys.

BENJAMIN E. SMITH, Counsel for the Defendant.

[2] The COURT. Are the parties ready?

Mr. MERHIGE. The Government is ready, Your Honor.

Mr. SMITH. We are ready, if the Court please. However, before we proceed, we would like to approach the bench in connection with a preliminary matter.

The COURT. Very well.

(Discussion held at the bench between Court and Counsel.)

The COURT. Have the jurors leave the court room, please. All jurors are asked to leave the court room for a few moments. Don't go far. There is a preliminary matter to be taken care of, and then you will be called back. All right, you may step out in the hall.

(Jury panel leaves the court room.)

The COURT. All right, you may proceed.

Mr. SMITH. Pursuant to my request to the Court, Your Honor, we are ready to proceed.

[3] The COURT. All right. Now, the Court understands that this examination of these witnesses that you are calling is in connection with your motion to quash the indictment, is that right?

Mr. SMITH. Yes sir, that's right.

The COURT. Which the Court has already overruled.

Mr. SMITH. Yes sir, that's right, but this is for purposes of perpetuating my record, Your Honor.

The COURT. All right, you may proceed. Now, as I understand it, any evidence that may be adduced during the trial of the case will be reserved until that time. I don't see any reason for going through this man's entire record at this time in connection with your motion. Is that agreeable?

Mr. SMITH. That's correct, if the Court please. I am just going to ask a few questions of each witness in connection with this motion that I have filed.

[4] The COURT. I understand. All right, let's proceed.

Mrs. CECILE CALMES, after first being duly sworn, testified as follows:

Examination by Mr. SMITH:

Q. Please state your full name, ma'am.

A. Mrs. Cecile Calmes.

Q. Mrs. Calmes, as I understand it, you are the Clerk of Draft Board No. 42, involved in this case, is that correct?

A. I am, yes sir.

Q. Did you have occasion to handle the file of Raymond Joseph Duvernay, the defendant here?

A. I did.

Q. Now, I take it that when a young man reaches the age of eighteen or nineteen, when he is drafted, he is then registered with your board if he is in your jurisdiction, is that right?

A. That's right.

Q. Then he is given a draft classification under the Selective Service Act, is that correct?

A. After he is registered, yes sir.

Q. After he has registered?

A. Yes sir.

[5] Q. Now, who determines that classification, what it will be?

A. The Board.

Q. Do they sit as a Board and decide on each case?

A. That's right.

Q. And I take it they also sit on exemptions and the qualifications of each individual person in deciding what classification they should have, is that correct?

A. That's correct.

Q. And they are the ones that hand out the deferments, is that correct?

A. That's right.

Q. And they do this by following the directions given them by the President of the United States, would that also be correct?

A. Yes, in accordance with the regulations of the Selective Service Act.

Q. And they have the job of determining whether or not these rules and regulations of the President apply or do not apply in any one particular case, is that right?

A. That's right.

Q. Now, from this Board's decision on each individual case, there can be an appeal taken, can there not?

A. Yes, within a certain time.

[6] Q. Now, does the Board vote on these determinations that they make, as to whether a person should be deferred or not?

A. I'm not sure I follow your question.

Q. In other words, I am simply asking you, Mrs. Calmes, whether the Board votes like a body of people?

A. Yes, they have what is known as a forum or meeting where they consider each file, and they vote on each one.

Q. Must the vote in each instance be unanimous, Mrs. Calmes?

A. No, not necessarily. Sometimes one or two may dissent.

Mr. SMITH. That's all the questions I have. Thank you, ma'am.

Mr. MERHIGE. The Government has no questions, Your Honor.

The COURT. All right. Call your next witness.

Mr. SMITH. If the Court please, in order to obviate the necessity of calling other witnesses in connection with my motion, we are prepared to stipulate that the other witnesses subpoenaed with relation to this particular motion alone; that if they were called to the stand, they would testify generally along the same line that [7] this witness has testified.

The COURT. Is that agreeable to the government?

Mr. MERHIGE. Would Your Honor bear with me a moment?

The COURT. Yes.

Mr. MERHIGE. Your Honor, at this point the Government will stipulate that the rest of the Board would testify as this witness has testified.

The COURT. Very well. Call those gentlemen back in.

(Prospective witnesses with regard to motion to quash returned to the court room.)

The COURT. Is either side going to need these members of the Board during the course of the trial?

Mr. SMITH. I will need Mrs. Calmes for my cross examination, under cross examination, if the Court Please.

The COURT. All right, she will remain.

Mr. MERHIGE. May Counsel approach the bench, please?

[8] The COURT. All right.

(Conference held at the Bench between Court and Counsel.)

The COURT. All right, call the jury.

(Jury empanelled and opening statements made to the jury.)

The COURT. All right, call your first witness.

Mr. MERHIGE. At this time, Your Honor, the Government moves to strike all the testimony that was elicited from the witness on cross examination relative to the Board's classification procedures on the ground that this was not relative to the issue on trial here today. This issue could have been raised by the defendant at a prior time if he had taken an appeal from the Board's position, and further it is not competent, in that he did not exhaust his remedies.

The COURT. Overruled.

DIRECT EXAMINATION

Mr. MERHIGE:

Q. Would you state your name and occupation, please, ma'am?

[9] A. Mrs. Cecile Calmes, clerk with the Selective Service Board, No. 42.

Q. Where is that Board located, Mrs. Calmes?

A. In the Post Office Federal Building.

Q. Is that here in New Orleans, Louisiana?

A. New Orleans, Louisiana, that's right.

Q. As clerk of Local Board 42, Mrs. Calmes, do you have control and jurisdiction over the records of all the registrants that are subject to that Board?

A. Yes sir, I do.

Q. From the records of that Board, can you tell the members of the jury if one Raymond Joseph Duvernay is registered with that Board?

A. Yes sir, he is.

Q. Is that person here in the court room today?
A. Yes sir, he is.
Q. Do you recognize him?
A. I recognize him, yes.
Q. Would you identify him, please, ma'am?
A. He is the gentleman sitting next to the lawyer.
Mr. MERHIGE. Let the record indicate that the witness has designated the defendant, please.
Q. Mrs. Calmes, as clerk of that Board, is it your duty to register and to oversee the registering of all [10] registrants that come in within that jurisdiction?
A. Yes sir, it is.
Q. Did you have occasion to register Mr. Duvernay for that Board?
A. Yes sir, I did. I registered Mr. Duvernay.
Q. I show you, Mrs. Calmes, a document marked G–1 for identification, and ask you if you identify this?
A. Yes, that's the registration card of Raymond Joseph Duvernay.
Q. Is that the card that Mr. Duvernay, as well as all other registrants, submit when they come in to register?
A. Yes sir.
Q. At what age are they required to come in and so register, Mrs. Calmes?
A. At the age of eighteen; that's the Federal law.
Q. And is that Mr. Duvernay's registration card?
A. That's Mr. Duvernay's card, yes sir.
Q. Have you ever seen that card before?
A. Yes sir, I have seen it before.
Q. Is that your signature at the bottom?
A. That's my signature at the bottom of the card, yes sir.
Q. I show you what is marked as Exhibit G–2 for identification purposes, and ask you if you will identify that for us, please, ma'am. Just tell the ladies [11] and gentlemen of the jury what that document represents.
A. That's a Selective Service Order to report for induction, addressed to Mr. Duvernay.
Q. And what's the date on that, Mrs. Calmes?
A. Mr. Duvernay was ordered to report for induction on May 20, 1966.
A. At what designated place, do you know?

A. Yes, the United States Army Recruiting Station, 2nd floor, Customhouse, 423 Canal Street, New Orleans, Louisiana.

Q. Mrs. Calmes, what date was that mailed to the defendant?

A. It was mailed to the defendant on April 13, 1966.

Q. And the reporting date was what date, please, from that?

A. May 20, 1966.

Q. Are you familiar with the regulations enough to know the prescribed minimum lapse of time to be allowed the defendant to comply with the notice to report? In other words, when must you notify the defendant?

A. The defendant has to be given ten days prior to reporting for induction, according to our regulations, but we usually give them practically a month, sometimes three weeks.

[12] Q. In this case it was a bit more than a month, from April 13 to May 20, isn't that right?

A. Yes sir.

Mr. MEI HIGE. Your Honor, at this time, the Government would offer both of these documents into evidence, being marked for identification G–1 and G–2.

The COURT. They may be admitted.

Mr. MERHIGE:

Q. Mrs. Calmes, do you in fact know that the defendant, Mr. Duvernay, did receive that order to report?

A. Yes sir, I do.

Q. How do you know this?

A. Because Mr. Duvernay reported to the office several days after he received it, and he presented the notice to me. He had it on his person.

Q. What were the circumstances which occasioned that, Mrs. Calmes?

A. He came to the office after he received the notice and advised me that he was seeking a deferment as being a student.

Q. Was he in fact a student then?

A. No, but he said he was planning to return to school in September of '66.

[13] Q. And at that time did you see the induction order in his possession?

A. Yes sir, he had it in his hand.

Q. He had it in his hand?

A. Yes.

Mr. MERHIGE. Your witness.

CROSS EXAMINATION

Mr. SMITH:

Q. Mrs. Calmes, this request that this man made for a deferment after he received this induction notice, that was not the first time that he made such a request of the Board, isn't that right?

A. You mean after he received the induction order?

Q. No, my question is was that the first time he had ever come to the Board requesting a deferment at all.

A. That he personally requested it?

Q. Yes.

A. I don't believe I understand your question.

Q. Had he not or had his mother not made other requests for deferment of this young man from the time he first entered the Selective Service System until now?

A. No, not to my knowledge. Do you mean did his mother request a deferment for him?

[14] Q. Let me ask it another way, Mrs. Calmes. I'm going to call your attention to what appears to me to be a portion of a record in which, for example, one document here is dated April 25, 1966, and it's a report of oral information, signed ostensibly by his mother, reporting to the Board, and requesting that a deferment be granted for her son because he was planning to go back to school, and in addition because he was the support for her and her six children.

A. No.

Q. Wait, let me show you the document.

A. She appeared at the office, Mr. Duvernay's mother, but she didn't make a request for anything. She was merely submitting this information. She was told that her son had been in and requested deferment to go to school.

The COURT. Let me see Counsel at the bench.

(Discussion held at the bench between Court and Counsel.)

The COURT. The Clerk will swear these witnesses.

(Mr. and Mrs. Duvernay put under oath by the Deputy Clerk.)

The COURT. All right, you are instructed not to talk about [15] this case with anyone except attorneys for either side. Step outside. All right, let's proceed.

Mr. SMITH:

Q. Now, Mrs. Calmes, you say that his mother did not request a deferment for him at a visit to Local Board 42?

A. No, she did not. She just appeared after he had been there.

Mr. MERHIGE: Your Honor, I don't see the relavancy of this. The mother is not on trial. The son is on trial. I don't know what relevancy it has.

The COURT: What's the purpose of this line of questioning?

Mr. SMITH: If the Court please, I think this is getting to the heart of the case. I am trying to determine if this Board's actions were arbitrary, or capricious, and this also goes to the veracity of the witness.

Mr. MERHIGE: But Your Honor, this is not a Board member; this is the Clerk of the Board. Counsel is apparently attempting to check her actions, and [16] not those of the Board.

The COURT: Well, I think the record speaks for itself.

Mr. SMITH:

Q. Now, Mrs. Calmes, you say that the lady didn't ask for a deferment for her son, is that right?

A. That's right. She appeared and gave information is all.

The COURT:

Q. I am trying to understand this. According to the testimony, this man was attempting to get a deferment in order to go to school, and yet he was seeking a deferment apparently about the same time to support this family of six children. Now, if he was going to do one, how could he do the other?

A. Those are the two grounds that he set out, Your Honor, and he made those requests at different times.

Q. But he made them, and not his mother?

A. Yes sir, his mother didn't do a thing when she came to the Board offices but give pertinent information about her son. She didn't request a deferment for him for any reason. Those were of his making.

The COURT. All right, proceed.

Mr. SMITH. If the Court please, I would like to offer, intro-[17]duce and file in evidence in connection with the testimony of this witness under cross examination, the document which she is holding in her hand.

The COURT. All right, let it be admitted.

Mr. SMITH:

Q. I am also going to show you, Mrs. Calmes, a copy of a report of oral information, dated April 15, 1966, which is part of the record furnished by the Government concerning a con-

versation with the registrant, and I ask you if this was signed by you?

A. That's correct, that was signed by me.

Mr. MERHIGE. May we see the document?

Mr. SMITH. Yes.

(Document shown to Mr. Merhige by Mr. Smith.)

Mr. MERHIGE. Thank you.

Mr. SMITH:

Q. Mrs. Calmes, I am going to show you now what purports to be a letter to the Local Draft Board No. 42, from the Social Welfare Planning Council, signed by Albert G. Rosenberg, Associate Executive Director, [18] dated May 12, 1966, relative to Raymond Duvernay and his employment status, and I am going to ask you if it is part of your duties and of the Board to receive this letter?

A. That's correct.

The COURT. Let me see it.

(Document submitted to the Court by Mr. Smith.)

The COURT. All right, you may proceed.

Mr. SMITH:

Q. Mrs. Calmes, I am going to ask you if you showed these three documents to the Draft Board?

A. That's correct.

Q. You did?

A. Yes sir.

Q. Did the Draft Board hold a meeting on this young man in connection with his request for a deferment?

A. Yes, they had the meeting. I don't recall the date.

Q. Maybe I can help you, Mrs. Calmes. Didn't you write to Mr. Duvernay, the letter being dated April 28, stating that the meeting was held by the Board on April 27; isn't that correct?

A. Yes, that's correct.

Q. That is a correct statement on that?

[19] A. Yes.

Q. Now, at the time the Board met on April 27, 1966, this was when they ordered a notice issued for the induction of this young man, isn't that right?

A. Not necessarily.

Mr. MERHIGE. If the Court please, I am going to object to that question, because that's not based on any facts that have been brought out in this case. Evidence has been introduced here that the order to report was dated April 13, and apparently

this Board didn't meet until the 27th, which was about two weeks later.

The COURT. What's the date on that letter?

Mr. MERHIGE. April 13, that's the date of the notice, Your Honor.

The COURT. The objection is sustained.

Mr. SMITH. If the Court please, I am going to offer, file, and introduce this document into evidence, and mark the same for identification Duvernay 4.

[20] The COURT. All right, let it be received.

Mr. SMITH:

Q. Mrs. Calmes, you did not then have this letter from Mr. Rosenberg before you wrote this letter of April 28, saying that the Local Board had considered some information given to them and that the man should report for induction; isn't that right? In other words, you didn't have this letter in front of you, and neither did the Board, wouldn't that be correct?

A. Do you mean the order of the Board for him to report for induction?

Q. Right.

A. No sir.

The COURT:

Q. Let me ask you this. When this man was notified to report for induction, was he given any information as to how much time he would have in which to appeal?

A. Oh, that's on the card, Your Honor.

Q. On the card itself?

A. Yes sir, on the card.

The COURT. All right, proceed.

Mr. SMITH:

Q. Mrs. Calmes, are minutes kept of Board meetings?

[21] A. Yes sir, minutes are kept of Board meetings.

Q. Where are they kept?

A. They are kept in the office.

Q. Do you keep them as the Clerk of the Board?

A. Yes sir, that's right.

Q. Are they available for production here, if any?

A. Yes sir, they are available.

The COURT. Do you mean the minutes concerning this registrant?

Mr. SMITH. Yes sir, Your Honor, that's what we want.

The COURT. All right, go ahead.

Mr. SMITH:

Q. They could be produced if necessary? That's the question.

A. Yes, they could be.

Mr. SMITH. No further questions.

The COURT. All right, you may step down.

Mr. MERHIGE. Pardon me, Your Honor, I have just a couple more questions to ask her.

The COURT. All right, just be seated.

[22] Mr. MERHIGE:

Q. Is there a procedure established, Mrs. Calmes, for taking an appeal from a classification pursuant to regulations?

A. Would you repeat that please? I don't think I followed you.

The COURT. Don't lead her, Counsel.

Mr. MERHIGE:

Q. Is there an appeal procedure appealing from a classification if a person feels that he should not be in that classification?

A. Yes, he has the right of appeal.

Q. Would that person also have a right to being helped as far as informing him of how to go about taking an appeal?

A. Yes sir. If he would request help, we would try to be helpful in every way.

Q. Did this man request any such help, or take any such appeal?

A. No sir. Mr. Duvernay never did request help on an appeal.

Mr. MERHIGE. No further questions.

The COURT. All right. Step down. Suppose we take a short [23] recess.

(Recess taken.)

The COURT. All right, you may proceed.

PHILIP J. PEKINS, after first being duly sworn, testified as follows:

DIRECT EXAMINATION

Mr. MERHIGE:

Q. Will you state your name and rank, please?

A. Philip J. Pekins. I am a Specialist Fifth Class, United States Army.

Q. What are your duties there generally?

A. At the present time, sir, or at the time that this happened that is involved in this case?

Q. Well, let's say approximately May 20, 1966.

A. At that time I was in charge of administration work at the Induction Center.

Q. On or about that day, did anything of an unusual nature occur at the Induction Station?

A. Yes sir.

Q. Will you please state in your own words to the members of the jury what that was?

A. Yes sir. The man sitting over there——

Q. You are referring to the defendant, Mr. Duvernay?

[24] A. Yes sir, Mr. Duvernay.

Q. Are you acquainted with Mr. Duvernay, the defendant?

A. Yes sir.

Q. Continue, please.

A. Mr. Duvernay reported in the morning to me, the morning of that day, and we continued to process him, but when it came time for me to interview him, he informed me that he was not going to go into the Army. At this time, I turned him over to Lieutenant Harrington.

Q. Did he say why he was not going into the Army?

A. Well, in cases like that, I turn them over to Lieutenant Harrington.

Q. All right, after turning him over to Lieutenant Harrington, did Lieutenant Harrington speak to the man, confer with him?

A. Yes sir.

Q. After this conference, was the defendant then inducted?

A. No sir.

Q. How do you know this?

A. Lieutenant Harrington turned him back, told him to return to me.

Q. Was the defendant there, when this happened, when the lieutenant told you that?

A. Yes sir.

Q. All right, continue, please.

[25] A. He turned him back over to me, informing me that the man had refused induction, so I told him that there would be no further need for processing him, and I told him that he was free to go.

Mr. MERHIGE. Your witness.

Mr. SMITH. No questions.

Mr. MERHIGE. I call Lieutenant Keith P. Harrington.

Lieutenant KEITH P. HARRINGTON, after first being duly sworn, testified as follows:

DIRECT EXAMINATION

Mr. MERHIGE:

Q. Will you state your name for the ladies and gentlemen of the jury, sir?

A. Lieutenant Keith P. Harrington, United States Army.

Q. What are your present duties, Lieutenant?

A. At the present time, my duties those of processing officer over at the Armed Forces Examining and Entrance Station, New Orleans, Louisiana.

Q. Lieutenant Harrington, were you so employed on May 20, 1966?

A. Yes sir.

[26] Q. Did you have occasion to meet this defendant in this matter, this man sitting here, Joseph Duvernay, on that date?

A. Yes sir, I did.

Q. Was it at that station?

A. Yes sir.

Q. Would you please describe the circumstances and the results of that meeting to the members of the jury, please?

A. Yes sir. On this date, Specialist Pekins, who at the time was the non-commissioned officer in charge of the induction area, turned over to me this man indicating that this defendant here was going to refuse to be inducted into the military service.

Now, at this time, I took the defendant back into our ceremonial room at the back of the station, and at this time I talked to the defendant for several minutes, explaining to him exactly what the possible penalties could be if a man refuses to be inducted, and when we had talked for that period of time, we both left the room.

Again I walked up to my desk, and on the way up to my desk, I asked Lieutenant Costa if he could take over my duties, my assignments, at the station, temporarily, and I inspected this man's particular [27] induction records, and again we walked back into the ceremonial room, and once in the ceremonial room at this time, I went through the oath of induction, the induction ceremony, and I proceeded up to the point where the man should have taken one step forward to indicate his acceptance and his willingness to go into the armed services,

and in this case, this man did not take that one step forward. At that time, I again sat down in the ceremonial room with him and read over again the regulations pertaining to penalties involved for refusing to be inducted and again I went up on the stage, and he stood in front of me, and we went through the induction ceremonies one more time, and again this man refused to be inducted. He got to that point, and he would not take the one step forward.

The COURT:

Q. This one step forward, what's the significance of that? Would you explain that to the jury?

A. Yes sir. The one step forward is itself actually the induction into the military service. That comes after the oath of induction is taken, and the next step is the step forward, which he refused to take.

Mr. MERHIGE:

Q. Did the defendant know this? Did he know the signifi- [28] cance of this step and what it meant to him if he did, and also if he didn't take this one step forward?

A. Yes sir, I explained it to him several times very carefully, and I'm sure he understood.

Q. You did apprise him of this and its significance?

A. Yes sir.

The COURT:

Q. You said you had a conversation with him when you brought him into the back? What was that conversation?

A. Well, sir, the text of the conversation was more or less, my questioning of him as to why he intended to refuse to be inducted, and explaining the penalties to him, and actually trying to get at the bottom of his purpose for refusing.

Q. Why did he tell you he was refusing to be inducted?

A. Sir, it was on the basis of more or less the rights of an individual, as far as his feelings were concerned, in other words, why should he be fighting in a foreign country when in this country there are many inequalities. That seemed to be his chief comment.

The COURT. All right, proceed.

[29] Mr. MERHIGE.

Q. Lieutenant Harrington, after you left the ceremonial room, as you have stated, and after attempting to induct this man twice, with his refusal each time, what did you then do?

A. Sir, upon leaving the ceremonial room, it was required that I complete a report on the man's refusing to be inducted into the service, so I had him to sit down at the desk in front of me, and I went over the requirements as far as the Army Regulations were concerned.

Now, one of the requirements is that if an individual refuses to be inducted into the armed services, he is to put in writing that he has refused to be inducted into the armed services, and in this case the defendant did so.

Q. I show you what has been marked for identification as Government Exhibit G–3 and ask you if you recognize this?

A. Yes sir.

Q. Is that your signature?

A. Yes, it is, sir.

Q. Is this the report which you just referred to?

A. Yes, it is.

Q. The second page of that states that this is his sig- [30] nature, and then there is a witness who also signed. Did you witness that signature?

A. Yes, sir.

Q. Did you see this statement being made and signed by the defendant?

A. Yes sir, the statement was signed at my desk.

Q. And the third page also signed by Raymond Duvernay, is that right?

A. Yes sir.

Q. Did you also see that signed?

A. Yes sir, I did.

Mr. MERHIGE. Your Honor, at this time the Government offers, introduces and files in evidence Government's Exhibit G–3.

Mr. SMITH. I have no objection.

The COURT. It may be received.

Q. After the defendant signed and delivered this statement to you, Lieutenant Harrington, what did you then do?

A. When I had completed the record, I turned him over to Specialist Pekins, who at that time released him from the building.

Q. To your knowledge, has the defendant ever been inducted?

[31] A. No sir.

Mr. MERHIGE. Your witness.

CROSS EXAMINATION

Mr. SMITH:

Q. Lieutenant, was Mr. Duvernay at that time given a physical examination?

A. Yes sir, he was.

Q. Did he submit without any trouble to that physical examination?

A. To the best of my knowledge, yes, he did.

Q. Was he then released?

A. I don't follow that, sir.

Q. Did he get a physical examination before this occurrence that you have described, or was that afterwards?

A. Oh, no, that was before.

Mr. SMITH. That's all, thank you.

The COURT. You may step down. Call your next witness.

Mr. MERHIGE. We call Lieutenant Costa.

[32] Lieutenant IGNATIUS J. COSTA, Jr., after first being duly sworn, testified as follows:

DIRECT EXAMINATION

Mr. MERHIGE:

Q. Will you state your name, please, sir?

A. Lieutenant Ignatius J. Costa, Jr.

Q. Lieutenant Costa, were you at the induction station here in New Orleans, on May 20, 1966?

A. Yes sir, I was.

Q. Did anything unusual occur on that date?

A. Yes sir. Some time during the morning Lieutenant Harrington stopped at my desk on his way to the ceremonial room with an individual behind him, and asked me to assume his duties as processing officer.

Q. Is that individual present in this court room today?

A. Yes sir, he is.

Q. Will you identify him?

A. I believe he is sitting there with the blue shirt on, right there.

Mr. MERHIGE. Let the record show that the witness pointed to the defendant.

Q. Would you continue, please; what did you then do?

A. Well, I assumed the duties of processing officer, covering for Lieutenant Harrington.

[33] Q. Did you see the defendant and Lieutenant Harrington go in any particular area, or what did they do that you saw?

A. Well, about a half hour or forty-five minutes later he emerged from the ceremonial room with Duvernay and came over to my desk and informed me that this man, this defendant, had refused to be inducted, and to escort him into his office.

Q. At that time, did you escort him into his office?

A. Yes sir, I did.

Q. What transpired there, if anything?

A. Lieutenant Harrington proceeded to explain Army Regulation requirements concerning induction of personnel, and explained that a report would have to be made out, witnessed by three signatures, by military officers assigned there, and I was one of the officers that witnessed this statement.

Q. Did you see the defendant sign this statement?

A. Yes sir, I did, sir.

Q. I show you what has been introduced in evidence as Government's Exhibit G–3, and ask you if you can identify this, or any part of it?

A. Yes sir, this is the cover letter attached to the report, along with the statement by the defendant, and it of course has my signature.

[34] Q. And you say that includes the statement that the defendant made at the time he refused induction?

A. Yes sir.

Q. To your knowledge, was the defendant ever inducted into the armed forces?

A. Not to my knowledge, no sir, not at all.

Mr. MERHIGE. Your witness.

Mr. SMITH. No questions.

The COURT. You may step down.

Mr. MERHIGE. Your Honor, the Government has no further witnesses in this matter. The Government rests.

The COURT. You rest?

Mr. MERHIGE. Yes sir, we have no further evidence to produce.

The COURT. Are you ready to go forward?

Mr. SMITH. We are prepared to go forward, Your Honor, but the defense would like move the Court at this time to allow me to request the production of [35] the minutes of this Board, particularly those of the meeting of April 27.

The COURT. Can you get them?

Mr. MERHIGE. We'll see if we can get them, Your Honor, but Counsel has had ample time to get those in advance of trial, and we think that this request comes a little late.

The COURT. What's the purpose of these minutes of the Board?

Mr. SMITH. If the Court please, we would have asked for these minutes sooner, but this has just occurred to me in the light of testimony we have had here today. If it is too much trouble to obtain them, I will withdraw the request.

The COURT. Why don't you see if you can get them?

Mr. MERHIGE. The Government must object to this request, if the Court please, on the ground that these minutes are not relevant to this case before the Court.

[36] Mr. SMITH. It involves a question of classification, if the Court please. I thought they would be in this file, but I've looked carefully and I don't see them there.

Mr. MERHIGE. Your Honor, the minutes of a meeting of a Selective Service Board does not relate to each specific individual. It's a meeting where a great number of these cases are handled at times, and that's all that the minutes really will reflect.

The COURT. Aren't the minutes concerning this registrant in his file?

Mr. SMITH. Your Honor, they are not in this file, to my knowledge, and I think we're entitled to see them.

The COURT. Well, let's get them. In the meantime, let's get on with this case. You can get them, can't you?

Mr. MERHIGE. Yes sir, Your Honor.

[37] The COURT. Very well, let's proceed.

Mr. SMITH. In addition, if the Court please, I will offer, introduce, and file in evidence, two further documents disclosed by the file furnished to me by the Government, one a report of oral information, dated April 15, 1966, and I would like to mark that for identification Duvernay 5, and the other is a letter from Mrs. Cecile Calmes, dated May 16, 1966, and signed by Mrs. Calmes, and I mark that for identification as Duvernay 6.

The COURT. It may be received.

Mr. SMITH. At this time, if the Court please, we call Raymond Joseph Duvernay to the stand.

RAYMOND JOSEPH DUVERNAY, after first being duly sworn, testified as follows:

Mr. SMITH:

Q. State your name to the jury, please?

A. Raymond Joseph Duvernay.

[38] Q. And your age?

A. Twenty.

Q. And where do you presently reside?

A. 2006 Lapeyrouse.

Q. Where were you born?

A. Monroe, Louisiana.

Q. Where did you receive your schooling?

A. New Orleans.

Q. Grammar and high school?

A. Grammar school and high school.

Q. When did you finish high school?

A. 1965, June of 1965.

Q. Now, before you finished high school, had you reached the age of eighteen?

A. Yes, I reached the age of eighteen in '64.

Q. What was your birth date?

A. January 20.

Q. January 20, 1964?

A. Right.

Q. Did you then register with the Selective Service?

A. I did.

Q. Was that registration with Local Board No. 42?

A. It was.

Q. Did you receive a classification at that time?

A. Yes sir, I did.

[39] Q. What was that classification?

A. A classification of 1–SH.

Q. That's a student classification?

A. Yes.

Q. But you had not finished high school?

A. That's right.

Q. Mr. Duvernay, what was the next thing that happened to you, after you finished high school?

A. I entered, enrolled in LSUNO, and I received a classification of 2–S.

Q. And that was in September of 1965, you say?

A. Yes sir.

Q. How long did you continue your studies at LSUNO?

A. Until shortly after mid-semester.

Q. Then what did you do?

A. Then I retired from school, and I tried to enlist in the Army.

Q. What happened when you tried to enlist in the Army?

Mr. MERHIGE. If the Court please, I object to that question because I don't think it's relevant to this case.

The COURT. I sustain the objection.

[40] Mr. SMITH:

Q. All right, what was the next thing that you did? What were you doing when you finished your schooling? Were you working?

A. I was working for the Housing Authority as a laborer, and that was at the St. Thomas Project, and after that I was employed by the Social Welfare Planning Council, and I was assigned to the Lower Ninth Ward.

Q. What was that about where you were working?

A. In the Lower Ninth Ward. I was actually working with the Community Planning Service.

Q. What did you do after that?

A. After that I went over into Mississippi.

Q. Why?

A. In connection with the Meredith March.

Q. Mr. Duvernay, have you been employed since then?

A. Yes, I have.

Q. Where?

A. My uncle's a contractor, and now and then I have worked for him.

Q. So you had one semester of college, is that right?

A. A half a semester of college.

Q. Now, Mr. Duvernay, this statement that you wrote at the time you were told to report for induction, is that a correct statement of your position in connection [41] with this matter?

A. Yes sir.

Q. And does that reflect your position in connection with this particular matter?

A. Yes sir, it does.

Q. Now, when you received your first orders for induction back in April of this year, did you then go to the Board and request that the Board grant you a deferment?

A. Not immediately after, no.

Q. At some point after that, you did, however, is that right?

A. I first went to the Board——

Mr. MERHIGE. If the Court please, I think Counsel is leading the witness, and I don't think that's proper.

The COURT. Yes, don't lead the witness.

Mr. SMITH. I'm sorry, Your Honor. I didn't mean to lead him.

The COURT. All right, let's get on.

Mr. SMITH:

Q. About how long after you refused to be inducted did you go to the Board to request a deferment?

Mr. MERHIGE. [42] I object to that. The witness has not said that he went to the Board to request a deferment.

Mr. SMITH. I withdraw the question and rephrase it.

The COURT. Very well.

Mr. SMITH:

Q. Did you appear at the Board in person at some point after you received your induction notice?

A. Yes sir, I did.

Q. For what purpose?

A. In an effort to get a deferment.

Q. Whom did you speak to there?

A. The Clerk, Mrs. Calmes.

Q. The lady who was on the stand here before?

A. Yes sir.

Q. What did she tell you?

A. Well, as I started talking, she just shook her head.

Mr. MERHIGE. If the Court please, I am going to object to this testimony, because this is a conclusion on the part of the witness.

The COURT. Overruled. Let's get on.

[43] Mr. SMITH:

Q. Mr. Duvernay, just tell us what you said to her and what she said to you.

A. Well, I tried to get a deferment on the ground that I had a plan to get some more schooling in LSU in September and also on the ground of hardship, but as I was talking, she just kept shaking her head. She wouldn't give me any answer, so I asked her, "How come when I went to the Army Recruiting Station and tried to enlist, they said I had a civil case?"

Q. Did you tell her there was some prosecution pending against you, as far as you knew?

A. Did I tell her that?

Q. Yes.

A. Yes sir.

Q. What did you tell her you had been charged with?

A. I just told her civil rights. I remember saying something about demonstrations and that the charges were——

Mr. MERHIGE. I object to this testimony, Your Honor, because I don't think this is relevant at all to this case.

The COURT. Objection sustained.

[44] Mr. SMITH:

Q. Did she say or indicate that she knew that this was what prevented you from being inducted into the Armed Forces?

A. She didn't say.

Q. She didn't say anything about that?

A. No sir.

The COURT:

Q. Tell me this. If you refused to be inducted into the Army because you didn't want to go to Vietnam or do any fighting, why was it that you went and tried to enlist before that on that other occasion? What was it that changed your mind?

A. Why I didn't want to go to Vietnam?

Q. Yes, after you had tried to enlist before?

A. Well, I believed in it then.

Q. You believed in it one day, and then the next day you did not, is that the way it was?

A. No sir, it wasn't the next day.

Q. How long after you tried to enlist was it that you decided you did not want to be inducted?

A. Oh, in a few weeks, say.

Q. When you went over to Mississippi, did you take part in the march or the demonstration that involved Meredith; was that what I understood you to say?

[45] A. Yes sir.

Q. Did you make any speeches over there, or just take part in the demonstration?

A. I was just there in sympathy.

Q. In sympathy?

A. Yes sir.

The COURT. All right, proceed.

Mr. SMITH:

Q. Duvernay, when did you try to enlist, do you remember the date, approximately?

A. Well, in the latter part of November, or the beginning of September I think it was.

Q. Last year?

A. In '65.

Q. Then did you ever go back to Draft Board No. 42 again after that time that you have just described to us?

A. Yes sir, I did. I went back with my mother.

Q. What happened on that occasion?

A. Well, my mother went over to see about getting a deferment, hardship, and the Clerk, Mrs. Calmes, she said, that I would receive a letter from the Board, that they had a meeting coming up, and that they would notify me by letter when they wanted me to appear before the Board and present my case.

[46] Q. All right, did you do that?

A. Well, I never did receive any notice, and I was going to go up anyway, but my mother told me to wait.

Mr. MERHIGE. I object to hearsay testimony, Your Honor.

The COURT. Don't repeat what anyone told you. Just tell us what happened.

Mr. SMITH:

Q. Mr. Duvernay, don't repeat what you mother said when you went there, just what happened, what you did there.

A. Well, my mother asked the Clerk about the letter and me appearing before the Board, and the Clerk denied saying what she did to me, and she said, that my case would be considered, and that I would receive a letter in a few days stating whether or not I was granted a deferment.

Q. Did you request a deferment at that particular time?

A. Yes sir, I did.

Q. On what grounds?

A. Hardship.

Q. On what ground?

A. I was going to help to support my mother and sisters and brothers.

[47] Q. Did Mrs. Calmes say anything about that, other than that it would be submitted to the Board for their consideration?

A. No, not that I recall.

Q. Now, did you ever go back to the Board at any other time after this second visit?

A. Yes, I went back with Richard Aaronson.

Q. Who was he?

A. He was team chief of the Lower Ninth Ward for the Social Welfare Planning Council.

Q. And what was the purpose of going with him that time to the Board?

A. The purpose was to try to see about my job with them.

Q. What position did you say he held?

A. Team chief.

Q. And what date was that with reference to the notice of induction you got, do you recall?

A. It wasn't too long before the date I supposed to report for induction.

Q. All right, what happened on that third visit?

A. I didn't pay attention to the conversation.

Q. What was the purpose of going there that day?

A. Well, the purpose was to present my case and to get a deferment if possible, and to have a hearing by the Board. [48] It was agreed that she would present a letter to the Board.

Q. Who spoke with Mrs. Calmes at that time?

A. Mr. Aaronson.

Q. What was his position?

A. He was team chief of the Lower Ninth Ward for the Poverty Program.

Q. And what was the purpose for your going there?

A. To see about getting a job deferment.

Q. Is Mr. Aaronson present in the city now?

A. No, he is not.

Q. Where is he?

A. New York.

Q. What's his reason for not being in the city at this time, do you know?

A. Yes, he's on vacation.

Q. When will he return?

A. In a week or week and a half, I imagine.

Q. Did you visit the office of the local board, Board 42, at any time subsequent to that?

A. Not that I recall, no.

Mr. SMITH. I have no further questions.

[49] CROSS EXAMINATION

Mr. MERHIGE:

Q. Mr. Duvernay, have you complied with all the directives issued by your Selective Service Board, other than this matter before the Court today?

A. Would you repeat that, please?

Q. Have you complied with all the other directives of your Draft Board, other than the one on trial here today?

A. Yes sir, I have.

Q. On March 4, 1966, did you not have an order to report for a physical examination, and you did not do so?

A. I reported for my physical examination, I think, five or ten minutes late, and I was reassigned to a later date, and I did report on time the next time.

Q. Are you sure it was five or ten minutes later that you reported?

A. Yes sir.

Q. Are you sure that it wasn't that you were simply too late to be examined, that you were reassigned a later date?

A. I don't think I was too late to be examined, but I was told at the office it was too late.

The COURT:

Q. You didn't agree with that either, did you?

[50] A. I didn't argue with them about it.

Q. That doesn't answer my question.

A. What was the question?

Q. I said, you didn't agree with that either, did you?

A. No, I didn't agree with it.

The COURT. All right, let's get on.

Mr. MERHIGE:

Q. You say you went to the Board when you got your notice of induction; was it very long after you got that notice?

A. Well, it wasn't immediately afterwards, but it was after that. I don't remember how long after it was.

Q. Was it within a few days or a week, or something along that line?

A. I don't know.

Q. Well, what I am driving at is, why didn't you go before, when you had your 1–A classification the preceding two years?

A. When I received that 1–A, I cut it out along the dotted

line, like it says, and I put it in my wallet, and I went about my activities.

Q. Mr. Duvernay, are you suggesting that you have been put upon or discriminated against or what have you by the Board?

[51] A. I think so.

Q. In 1964, were you not classified 1–A?

A. In 1964?

Q. Yes.

A. In 1964, I was classified 1–A by mistake. The Board, they claimed I didn't fill something out properly.

Q. All right; how about in February, 1964, how about then?

A. I don't know.

Q. Weren't you classified 1–S; wasn't that a deferment?

A. Yes.

Q. And your classification was changed to 1–A in July of 1964, isn't that right?

A. That was when the mistake was. They thought I had got out of school when they changed that classification, but that was a mistake. I went back to the Board and they changed that, you know, corrected that. I was sent a form back to fill in with the right information.

Q. You didn't just put that one in your pocket, like you did the later one, when you were classified 1–A, did you? You took a little more time with that one, because you found a mistake in it, is that right?

A. Yes, there was a mistake.

Q. And you just didn't put it in your pocket that time, as you have just told us, did you?

[52] A. No, I didn't.

The COURT:

Q. Let me ask you this. When you were in school, you were given a student classification, weren't you?

A. Yes sir, I was.

Q. And I believe you said you went to college one semester, is that correct?

A. In college?

Q. Yes.

A. A half semester, sir.

Q. A half semester?

A. Yes sir.

Q. I see. And then later you wanted a student classification on the ground that you intended to go back to school, is that right?

A. Yes, that's right.

The COURT. All right, proceed.

Mr. MERHIGE:

Q. In 1964, late in November, a form was mailed to you for verification of enrollment, which you sent in on November 23, 1964, and you didn't get a student deferment, isn't that right, sir?

A. Yes, that's right.

Q. November 17, 1965, you got a student deferment, is that [53] right, sir?

A. That's correct.

Q. How much time did you say you spent in school, Mr. Duvernay?

A. In college?

Q. In college, yes sir.

A. A half semester.

Q. A half semester?

A. Yes.

Q. What year did you get out of high school?

A. '65.

Q. So you started college in '65, would that be correct?

A. Yes.

Q. Would that have been in September or June?

A. September.

Q. And then you had your 2-S classification, which was a student deferment, is that right?

A. Yes sir.

Q. In January, 1965, or rather, 1966, you were classified 1-A, is that right, sir?

A. Would you repeat that, please?

Q. In 1966, in January, you were classified 1-A, isn't that right?

A. That's right.

Q. Now, from this time on, your case actually started, and [54] now I want to ask you, Mr. Duvernay, if you feel you were discriminated against up to that point?

A. Not in the sense of a classification.

The COURT:

Q. You were not in school then, were you?

A. Sir, I just can't give a yes or no answer to some of these questions. If I could explain, maybe I could clear it up.

Mr. MERHIGE:

Q. I would rather you just answered the questions, Mr. Duvernay, and your attorney can ask you any more questions that he wants when we are finished, okay?

A. Yes.

Q. Now, when you were put in 1–A, then you were not in school, were you?

A. No, I wasn't.

Q. Mr. Duvernay, when you went to the Board the first time with your induction notice, and you stated that you wanted a deferment, did you offer anything to sustain your position that you had a right to a deferment? In other words, did you file anything in your record? Did you give any kind of proof?

A. What do you mean, proof?

Q. In other words, you didn't go up to the Board and fill out any papers and submit anything in your record, to [55] give the Board some kind of notice or grounds for reclassifying you on any grounds, did you?

A. I told you when I went up and started to talk to the Clerk, she just sat there shaking her head.

Q. Is that all she did, shake her head?

A. Yes sir.

Q. She didn't say anything to you?

A. No, she didn't, not until I told her about this thing hanging over me in court, and then all she said was to produce evidence of that.

Q. Not until that time?

A. Not until that time, no sir.

Q. She never said a word to you until you brought that up?

A. No, she didn't. She just sat there shaking her head, and I figured there was no use of me going on talking to her if I wasn't going to get anywhere.

Q. Now, on this third visit you say you made with your housing chief, you stated that he or you were informed that a letter involving your work would be presented to the Board, is that what you said, sir?

A. Yes.

Q. Was a letter presented to the Board?

A. According to Mrs. Calmes.

Q. What date was that, do you know?

A. No, I don't.

[56] Mr. MERHIGE. Counsel, do you have the letter there?

Mr. SMITH. Yes, here it is.

(Document handed to Mr. Merhige by Mr. Smith.)

Mr. MERHIGE:

Q. Is the letter to which you were referring, Mr. Duvernay?

A. Yes, that's it.

Q. This has already been introduced in evidence as Exhibit 3, isn't that right?

A. Yes, that's the one.

Q. Tell me, Mr. Duvernay, how long were you employed in this type of work?

A. In this type of work?

Q. For the Social Welfare Planning Council.

A. Oh, a couple of months.

Q. A couple of months?

A. Yes sir.

Q. That would make it March some time when you started, would that be correct?

A. I don't know.

Q. Your notice was not mailed until April 13, after your original request for a deferment. Why didn't you come in before that; you were working? You had been working over a month for these people, by your admis-[57]sion, and yet you didn't do anything about it at that time, did you?

A. No, I didn't.

Q. You didn't do anything to change your draft status then, did you?

A. No, that was negligence on my part.

Mr. MERHIGE. I have no further questions.

Mr. SMITH. That's all the questions I have.

The COURT. All right, you may step down. Call your next witness.

Mrs. RAYMOND DUVERNAY, after first being duly sworn, testified as follows:

DIRECT EXAMINATION

Mr. SMITH:

Q. You are Mrs. Raymond Duvernay, mother of Raymond Joseph Duvernay, seated here, is that right?

A. I am.

Q. Did you ever have occasion to accompany him to the office of the local draft board No. 42, in New Orleans?

A. Yes sir, I did.

[58] Q. Do you remember when that was?

A. I don't remember the exact date.

Q. Would you give it to use approximately?

A. Well, it was after he got his induction notice. I do know that.

Q. Why did you go there, Mrs. Duvernay?

A. Well, I went there to make a request for a deferment for him on hardship, because he was working at the time and was part of my support and his brothers and sisters.

Q. How many children was he helping to support?

A. Six.

Q. How much money would he give you?

A. Well, out of his first job, he gave me fifty dollars. That was every two weeks, out of his pay check, and then he got another type job, that was social welfare planning, and he gave me seventy. That was a better type job.

Q. Whom did you see when you went up to the Board?

A. Well, the lady that was on the stand. I don't remember her name, but she was the clerk up there.

Q. Mrs. Calmes?

A. Yes sir.

Q. Do you remember Mrs. Calmes?

A. Yes sir, I remember her.

[59] Q. She was the lady who was here from the Board and testified?

A. Yes sir, that's the one.

Q. What did she say when you requested this deferment for your son?

A. Well, she asked me all kinds of questions about if my husband and I was together and why did he want a deferment, and I explained it to her. I told her he was my only support, other than what I could bring in. I was working at the Charity Hospital.

Q. Then what did she say?

A. Well, she was just shaking her head like she didn't want to bother with us. I don't know what she meant by that, but she asked me about his salary and everything, and she wrote it down and had me sign it.

Q. Then what happened?

A. Then she said that the Board was going to meet. If I'm not mistaken, I think we went there on a Friday, and the Board was supposed to meet that following Wednesday, and she said it would have to come up before the Board then, and that the Board was meeting that Wednesday at seven o'clock, that Wednesday evening, and that he would receive a letter in the mail for him to come to that meeting, which he did not receive, [60] so that Monday or maybe it was Tuesday we went back.

Q. Was that before the Wednesday that the Board was to meet?

A. Yes sir, because he had not received that letter, and it had me worried, because I knew she said we would receive the letter.

Q. What happened when you went back this next time to ask about the letter, why it hadn't arrived? What happened then?

A. Well, she told me that she did not say that he would receive a letter. She said you have to get an invitation to sit in on the hearing. I said, "Well, that's what we are waiting for; you said he would receive a letter," but she contradicted me and said that she did not say that.

Q. Did you ask her for an invitation?

A. Yes sir, I did.

The COURT:

Q. What happened then?

A. She said it wasn't necessary.

Mr. SMITH:

Q. What did she say?

A. She said it was not necessary, that it was not necessary for him to be present at the meeting.

[61] Q. What did you then do?

A. Well, we went on back home.

Q. Did you go back to the Board a third time, Mrs. Duvernay?

A. Yes sir.

Q. How much later did you go back this third time?

A. I went, I think it was a couple of days or about three or four days after the hearing.

Q. After what?

A. After the hearing was supposed to be.

Q. Do you mean after the hearing that Wednesday?

A. Yes sir.

Q. All right, what happened?

A. She was not there that time.

Q. Whom did you talk to?

A. I don't know the lady's name, but it was the lady at the other desk, and the lady recognized me, and she said Mrs. Calmes was not there, that she was out today, and she asked me if she could help me, so I told her about it and I told her I come back to talk to Mrs. Calmes about it again.

Q. What did you want to do on this third trip; what was the purpose of your going there the third time, Mrs. Duvernay?

A. I wanted to know what was said at the meeting, and I [62] wanted to know why I couldn't have a personal appearance with the Board.

Q. What happened then? What did the lady say to you about your request for a personal appearance before the board?

A. She said there wasn't anything she could do about it, but that she would let her know that I had been there, and I never heard no more about it.

Q. Did you ever go back to the Board again after that?

A. No, because his time was up for him to go into the service, and in other words, his time to report to the induction station.

Mr. SMITH. I have no further questions. Thank you.

CROSS EXAMINATION

Mr. MERHIGE:

Q. Mrs. Duvernay, if you will bear with me a moment, I just want to get straight on exactly what happened. Now, you accompanied your son up to the Board the first time to seek a deferment for him, is that right?

A. Yes sir.

Q. And during that period of time, did you attempt to get an audience with the Board?

A. Yes sir, I did.

[63] Q. And what did you say happened then?

A. That was when she said he would get a letter from the Board through the mail. She said she would get it out to him that evening.

Q. And you say he didn't get any such letter?

A. No sir, he didn't.

Q. And then you went back, I believe you said, the following Monday or Tuesday, before this Board meeting, is that right?

A. Yes, we did. I was getting worried. We didn't get the letter, and I wanted to know why.

Q. And you never received that letter, you are sure of that?

A. Yes, I am sure of that; he has yet to get that letter.

Q. Now, the second time you went back up there, I'm not clear on why you went up the second time?

A. Well, I wanted to know why we didn't get a letter. She told us that we would get a letter for him to come down and appear at the Board meeting.

Q. What did she tell you on this second visit to the Board?

A. She said you had to have an invitation, and I told her that that's what we was waiting for, for that letter to come for him.

Q. Now, your third visit to the Board, that time Mrs. [64] Calmes was not there, and one of the other clerks talked with you, is that right?

A. Yes sir. Now, this other lady wasn't handling his record though, but she said she would make a note that we had been in and put it on this other lady's desk.

Q. You mean on Mrs. Calmes' desk?

A. Yes sir.

Q. Did she make any other comment to you about this matter?

A. No, she just took the notation to give to the other lady.

Mr. MERHIGE. Thank you. I have no further questions.

The COURT. Do you have anything further?

Mr. SMITH. No, Your Honor.

The COURT. All right, you may step down. Call your next witness.

Mr. SMITH. Your Honor, the only other part of my case that I have on behalf of the defendant is the cross examination of members of Board 42, but I would like to be able to do that after I have taken a quick glance at these minutes.

[65] The COURT. All right, when will you have those minutes?

Mr. MERHIGE. We can get them right away, Your Honor, whatever the Court wishes.

The COURT. Well, let's take a recess until 2:15, and that will give you time to produce them and have Counsel to look at them. We will recess until 2:15 o'clock, and I will instruct the jurors that they are not to discuss this case among themselves or with anyone else until that time.

All right, court will be in recess until 2:15.

(Recess taken for lunch.)

2:15 p.m.

The COURT. All right, you may proceed.

Mr. MERHIGE. Your Honor, the Government at this time would like to file xerox copies of the two documents previously filed, G–1 and G–2.

The COURT. All right. Is there any objection?

[66] Mr. SMITH. We have no objection, Your Honor.

The COURT. All right, they may be admitted. Who is your next witness?

Mr. SMITH. I would like to call Mr. Florian Lizana, Your Honor.

The COURT. Very well.

FLORIAN J. LIZANA, after first being duly sworn, testified as follows:

CROSS EXAMINATION

Mr. SMITH:

Q. Would you state your full name, please, sir?

A. Florian J. Lizana.

Q. Mr. Lizana, are you a member of Draft Board, or Selective Service Board No. 42?

A. That's right, sir.

Q. How long have you been a member of that Board?

A. Between four and five years.

Q. Are you presently serving as chairman of that Board?

A. Yes.

Q. Whom did you replace as chairman?

[67] A. I believe that was Jack Helm.

Q. Mr. Helm?

A. Yes sir.

Q. Mr. Helm resigned?

A. Yes sir.

Q. As a matter of fact, wasn't he the same Mr. Helm that had been accused of being a member of the Ku Klux Klan?

Mr. MERHIGE. I object to that question, if the Court please. That has no relevancy here.

The COURT. Objection sustained.

Mr. SMITH:

Q. Was Mr. Helm a member of the Board when Mr. Duvernay was originally classified by Board No. 42?

A. I would have to see the records on that before I could answer that question.

Q. I show you what purports to be the minutes of Local Board 42, at a meeting dated January 19, 1966, which I will mark for identification purposes Duvernay 7.

The COURT. When he was originally classified?

Mr. SMITH. Yes, Your Honor, when he was originally classified [68] 1–A.

The COURT. Well, he was classified 1–A off and on, wasn't he?

Mr. SMITH. That's right, Your Honor. This was the second time, just about at the time of this particular order of induction, may it please the Court.

The COURT. All right.

Mr. SMITH:

Q. What I am asking, sir, is was Mr. Helm present at this meeting of the Board, when Duvernay was classified 1–A?

A. Well, according to this record, it says here that he was present at this meeting when Mr. Duvernay was classified.

Q. And the classification was what, Mr. Lizana?

A. Well, actually it was changed from 2–S to 1–A.

The COURT:

Q. Was he a member of the Board when Duvernay was classified 2–S?

A. I am sure he was, sir.

The COURT. All right, let's get on.

[69] Mr. SMITH:

Q. Now, I show you the first part of those minutes of this Local Board meeting which I have just shown you, which has been marked Duvernay 7, and I ask you if it indicates in any way that Mr. Duvernay's classification was by a majority vote of the Local Board?

A. Yes, these were all by a majority vote.

Q. That's what I'm getting at, Mr. Lizana. This shows the classification of five hundred registrants, and now my question is, did you all vote on those five hundred as a group, or individually, or how?

A. Five hundred as a group—I don't quite understand your question, sir.

The COURT:

Q. His question is, did you consider each case individually, or did you consider the whole group at one time in your vote.

A. Sir, the way that is done, and it is pretty much routine with all Draft Boards, I'm sure, is that one man will say that we are classifying a man as whatever classification it may be because of such and such, and then the Board will concur on the vote.

Mr. SMITH:

Q. Isn't it a fact, Mr. Lizana, that you and your clerk, who does most of the clerical work for you in preparing this list, just—that you just draw up a list [70] of the names of applicants or registrants, and in this case there are five hundred eighty-four listed here, and don't you just present those to the rest of the Board and vote on them in a lump sum?

A. Well, now, the clerk does categorize the applicants or registrants, and then the Board votes on these, but not as a lump group, but as individuals.

Q. Mr. Lizana, are you telling us now that you voted five hundred eighty-four times that day?

A. If that was the number of registrants, yes.

Q. Well, this shows five hundred eighty-four registrants that day. Are you saying now that you took five hundred eighty-four ballots that day?

A. No, not ballots, sir.

Q. Well, how is your vote recorded?

A. It's an oral vote.

Q. Oral vote?

A. Yes sir.

Q. All right, I'll ask the question again, did you vote five hundred eighty-four times that day?

A. If there are five hundred eighty-four names on there, I suppose we did.

Q. I'm going to show you this document again, Mr. Lizana, and I have reference here to the first part, which says that there were five hundred eighty-four regis-[71]trants classified by the Local Board that day, would you agree to that? Isn't that what it says?

A. Yes, that's right.

Q. Did you vote for them as a lump, as a group, or did you vote for them individually?

A. Individually, sir.

Q. Are you also saying, sir, that of these five hundred eighty-four votes, every one of them was a vote of five to nothing, a unanimous vote, is that right?

A. That may be, sir. I don't know. I can't tell you just from memory on that.

Q. Well, I would just like for you to confirm that, if you would, sir.

A. That's what it says.

Q. Now, do you recall voting five hundred eighty-four times, I mean of your own independent recollection, that day?

A. No, I don't. I don't recall voting that number of times. I wouldn't be able to remember that.

Q. You don't recall voting five hundred eighty-four times then?

A. No sir.

Q. Mr. Lizana, how did you proceed with this voting? Was each name called off, and then you would take a vote on it, is that the way it was?

[72] A. Well, it would depend on whichever Board member happened to have the particular file at that time, sir.

Q. Are you saying then that you would discuss each file before you took a vote on that particular registrant or applicant?

A. Yes, but now it wouldn't be a long discussion, sir. The one who had the file would just say that we were going to classify this or that man as such and such, and the rest of the Board would be in agreement after the facts were presented.

Q. According to this, your meeting started at seven o'clock, and adjourned at ten; that's three hours, is that correct?

A. Yes, according to my mathematics it is.

Q. Do you recall voting five hundred eighty-four times in those three hours?

A. I suppose so.

Q. Sir?

A. I suppose we did, if it says that, if the record shows that.

Q. Well, I'm asking you; I don't want to put words in your mouth.

The COURT:

Q. Were many of these reclassified?

[73] A. Yes, that's correct, sir.

Q. Would you say most of them were reclassified?

A. No sir, the majority of those were not.

Q. All right.

Mr. SMITH:

Q. Now, Mr. Lizana, I show you the first page again, of the Exhibit which has been marked Duvernay 7, which are the minutes of the meeting of January 19, and I ask you, did you take pains to discuss in detail certain classifications of certain persons, let's see, eight persons, at that meeting, in which their particular cases were discused in more detail?

A. That's correct, sir.

Q. Now, I show the minutes of the meeting of April 27, 1966, and ask you if you were at that meeting and if the Board at that time considered the classification or status in any way, of Mr. Duvernay, and I will mark this document for identification purposes Duvernay 8.

A. I was at that meeting, according to this record, yes. I don't remember of my own knowledge being there at the time, however.

Q. You are saying that you have no independent recollection of being there, but the record shows that you were there; is that what you are saying?

[74] A. That's right, sir. I was there, but I do not see any record of Mr. Duvernay on this record.

Q. I am going to show you another document, which I will mark Duvernay 9, and ask you if that is a reproduction of the minutes of the meeting of May 23, and if you were there, and if Duvernay was mentioned?

A. The record shows I was at the meeting, sir, but there is no mention of Duvernay on this, according to this form. May I elaborate on that?

The COURT. Yes, you may.

A. There is a possibility that Duvernay was discussed at this meeting, and there was no reason for his name being on there, so in that case it would not have appeared. The record or his individual file would bear more information than that would, sir.

Mr. SMITH:

Q. It is possible that there were a lot of people there then, that might have been mentioned, and there is nothing in the minutes about that, is that right?

A. That's correct, sir.

The COURT:

Q. You say the personal records of the individual would have more information than this?

A. That's right, sir.

[75] Mr. SMITH:

Q. But you have examined the minutes of these two meetings, and the name of Duvernay is not mentioned, at least in these typed minutes, is that right?

A. Yes sir, that's right.

Mr. SMITH. In connection with the witness' testimony, Your Honor, I would like to file and introduce in evidence Duvernay 8 and Duvernay 7 and Duvernay 9.

The COURT. They may be admitted.

Mr. SMITH. We tender the witness.

Examination by Mr. MERHIGE:

Q. Mr. Lizana, you are a member of Local Draft Board 42, and you have been for four or five years, I believe you said, is that right?

A. That's right, sir.

Q. In your capacity as a member of the Board, and as chairman, you have had countless numbers of cases involving classification and reclassification of applicants or registrants before the Board, have you not, sir?

A. That's correct, yes.

Q. Do you have any recollection of these cases by name, the [76] names of people you discussed, and so forth? Do you recall all of those cases individually?

A. No, that would be impossible.

Q. Now, you stated that the clerk categorized the names of applicants in many of these files before they were exhibited to the Board for its vote or consideration, is that right?

A. That's right.

Q. Are these routine files, Mr. Lizana?

A. Yes sir.

Q. Are these files wherein generally there is no mitigating factor that would put them in a doubtful category, or that would require additional consideration and discussion of the facts involved in these cases?

A. No, they would be more or less routine, most of them.

The COURT:

Q. Let me ask you this. After an applicant receives a notice of induction and sends in a letter claiming an exemption or asking for a deferment on grounds of employment or hardship or something of that nature, is his letter considered?

A. Very definitely, sir.

Q. It would be?

A. Yes sir. Any information that is submitted would be considered if it was thought to be of any consequence [77] at all. Any information in a case like that would be definitely reviewed, and the Board would definitely take action at that time.

Q. Even if he may have already received notice of induction?

A. That's right, sir.

Mr. MERHIGE:

Q. But in so considering, there would be no need to reopen a man's classification, would there, sir?

Mr. SMITH. I object to the leading question, may it please the Court.

The COURT. You put him on. You put him on for cross-examination, and under the rule he can be cross examined by the other side. Answer the question.

A. What was the question again?

Mr. MERHIGE:

Q. Are you able to reclassify a man after considering additional factors, such as a letter, and so forth, that might lead to a different classification of this man, without opening his file?

A. No sir.

Q. When you said that the clerk categorized the names of [78] the applicants before they are tendered to the board for decision, do you mean she puts them in segregated form, separating the more involved ones, from the run-of-the-mill type; would that be correct, sir?

A. That's correct, yes sir.

Q. And would it be correct to say, sir, that you would spend more time discussing the details and considering the more involved cases than the routine cases?

A. Very definitely.

Mr. MERHIGE. I have no further questions.

The COURT. All right, you may step down. Call your next witness.

Mr. SMITH. I call Roy J. Martin.

The COURT. Very well.

ROY J. MARTIN, after first being duly sworn, testified as follows:

CROSS EXAMINATION

Mr. SMITH:

Q. Please state your name.

[79] A. Roy J. Martin.

Q. And you are a member of the Draft Board, No. 42, is that right?

A. Yes.

Q. Mr. Martin, I would like to discuss briefly the minutes of some of the meetings of the Draft Board with you.

A. Yes sir.

Q. I have an exhibit here marked for identification Duvernay 7, which purports to be minutes of the Local Board meeting for January 19, 1966, at which time Mr. Duvernay is alleged to have had his draft classification changed from Student Deferment to 1–A, and I want you to look at this document, if you will, sir.

A. All right.

Q. Were you at that meeting, Mr. Martin?

A. Yes, I was at that meeting.

Q. Do you recall that meeting, sir?

A. Yes, I remember the meeting.

Q. According to the minutes, did that meeting start at seven o'clock, and end about ten o'clock?

A. Yes, sir, that's approximately correct.

Q. Now, the minutes of that meeting reflect that a large group of registrants, five hundred eighty-four, were classified by majority vote of the Local Board, [80] is that right?

A. Yes.

Q. How is that voting done, Mr. Martin?

A. Well, we review the routine cases, and of course most of them are routine, and we vote on them. One member will recommend a classification to be assigned to a registrant after a look at the file, and the remainder of the Board will concur in that finding. Now, of course, when we have a case involving some question, then that case is discussed at full length as to its merits and demerits, and they take a little more time.

Q. And is it fair to say that you assign classifications to the routine cases, or maybe I should say to the ones that present no immediate problems, first, and then go on to the individual cases that might have some problem presented; is that about the way it goes?

A. Yes sir, that's right.

Q. And those that present problems, you discuss in pretty good detail, I take it, is that right?

A. Yes, that's right.

Q. You have no independent recollection of what you did in any of those cases in which you may have found problems when they were presented at this Board meeting, [81] do you?

A. No, I don't remember particular cases, because we have so many, but I could do this, Mr. Smith, I could familiarize myself with the file of an individual and determine probably the reason we assigned whatever classification was assigned to him.

Q. But I mean, you have no independent recollection of any of these cases, outside of examining the records to determine that, do you?

A. No, I don't.

Q. Then, Mr. Martin, I gather from your testimony that there is a difference in the way you handled this first group of five hundred eighty-four registrants and the way you handled the eight that follow on these minutes, isn't that correct?

A. Of course, Mr. Smith, I don't have the benefit of each file before me, but referring to these minutes, we don't include all those names or discussions on the minutes unless it has a particular significance, or is considered very much out of the ordinary.

Q. Let me ask you this, Mr. Martin. Did you consider those five hundred eighty-four cases, each individually, or did you just vote to take the clerk's classification in each of those cases?

A. We discussed each one, Mr. Smith, and unless there was [82] some dissension, only one wrote on the registrant's sheet the result of the voting, in other words, his particular classification.

Q. Are you telling us that you considered and voted on these five hundred eighty-four cases individually that night between the hours of seven and ten?

A. Well, that's as difficult as it sounds when you consider that we had five members, and the great majority of these cases presented no problem. They were routine cases, so what we do, we divided them up among the members, which lightens the load quite a bit on each member, and then at these meetings when these names are brought up, the member who has studied the file will make his recommendation and give his reasons, and then the vote is taken, but they are taken up individually, if that's your question.

Q. And the Board considers each case then and votes individually on each one, is that right?

A. Yes sir, the Board does, yes.

Q. All five hundred eighty-four in this case?

A. Yes.

Q. Where in the minutes were these other individuals listed where there was a problem presented and where you had a more extensive discussion, about those cases? Would that be in the minutes?

[83] A. Well, I don't have the file before me, Mr. Smith, so I couldn't answer that particular question.

Q. The reason I am asking you that, Mr. Martin, is that the vote on these routine cases is shown right here, and out of the five hundred eighty-four cases, every one of them shows that the vote was five to nothing, is that right?

A. Yes sir, that's right.

Q. Mr. Martin, do you recall a letter that was received by the Board from Mr. Rosenberg from the Social Welfare Planning Council, asking that this man be deferred?

A. I have some recollection of it, yes.

Q. Now, I am going to show you a copy of that letter in this case, Mr. Martin, marked Duvernay 3, and ask you if the Board ever took any action or considered it even?

A. Well, that letter was discussed at one of the meetings, Mr. Smith, but because of the status of the case, there was no further action.

Mr. SMITH. I have no further questions.

Mr. MERHIGE. I have no questions.

The COURT. All right, you may step down. Who's your next [84] witness?

Mr. SMITH. Mr. Sidney A. Bozonier.

SIDNEY A. BOZONIER, after first being duly sworn, testified as follows:

CROSS EXAMINATION

Mr. SMITH:

Q. Please state your name to the ladies and gentlemen of the jury, sir.

A. Sidney A. Bozonier.

Q. And you are a member of Draft Board 42, is that right, sir?

A. Yes.

Q. And that's located in New Orleans?

A. Yes sir.

Q. And you have been a member how long, sir?

A. About sixteen years.

Q. Now, Mr. Bozonier, you were present at a meeting on January 19, 1966, when this young man, the defendant, had his classification changed from a Student Deferment to 1-A, is that right?

A. Well, I don't know if I attended that meeting or not. I attended most of the meetings, and still do, but I can't say whether I was at that one or not.

[85] Q. If the minutes of that meeting show that you were present, you wouldn't deny that, would you, sir?

A. No, if the minutes have my name down there as being present, then I was present. I try to attend most meetings. You say it was one in November?

Q. No, January 19, 1966.

A. Oh, yes, January 19, that's right; yes, I attended that meeting.

Q. You were there?

A. Yes.

Q. Now, Mr. Bozonier, I note here, according to these minutes, that the classification of five hundred eighty-four people was determined by majority vote of the Board that night, is that correct?

A. Yes.

Q. How was that accomplished, sir? How was that vote taken on that many registrants?

A. Well, they are categorized by the Draft Board clerk, and then they are divided up, and each of us takes so many and studies it and decides on the classification, and then we concur with one another on them.

Q. That is more or less routine, would that be correct, Mr. Bozonier?

A. Yes, I would say so.

Q. Now, how about these that follow, with a little bit [86] more description? Would you call these non-routine cases that are listed below here?

A. Yes, that would be correct. We spend a little more time on those.

Q. You mean the Board members?

A. Yes, we talk to one another about them.

Q. Mr. Bozonier, we have a document here that is marked for identification Duvernay 8, which is the minutes of the Board on a night you were there, with two hundred thirty-four registrants being classified by majority vote. We also have a letter from Mrs. Calmes, stating that Duvernay's request, that is, his mother's request for a deferment, had been given careful consideration by the Board that day. You were one of the Board members that participated in that consideration, is that right?

A. Yes, I was.

Q. And did you carefully consider that letter, as Mrs. Calmes' letter says?

A. Yes sir.

Q. Do you see Mr. Duvernay's name in these minutes, indicating that such a letter had been considered by the Board?

A. No, it isn't here, but it's in the registrant's file. There's a paper in the registrant's file that shows [87] that it was considered.

Q. Isn't it possible that this letter might have got into this file without being considered at a Board meeting?

A. No sir.

Q. That's impossible?

A. Yes sir.

Mr. SMITH. I have no further questions.

Examination by Mr. MERHIGE:

Q. Sir, in considering the classifying of a registrant, isn't the registrant's file at your disposal?

A. Yes sir.

Q. And this is what you use, isn't that correct?

A. The registrant's file, yes sir.

Mr. MERHIGE. Thank you. I have no further questions.

The COURT. You may step down.

Mr. SMITH. That's all the testimony we are going to present, Your Honor. I am not going to call any other witnesses. I think that's enough.

The COURT. You rest?

[88] Mr. SMITH. We rest, Your Honor, yes sir.

Mr. MERHIGE. Your Honor, I have one rebuttal witness whom I wish to put on, with the permission of the Court.

The COURT. All right.

Colonel DOUGLAS C. PRITCHETT, after first being duly sworn, testified as follows:

Mr. MERHIGE:

Q. Would you state your name, please, sir?

A. Douglas C. Pritchett.

Q. And what is your occupation, sir?

A. I am an attorney—advisor for the Selective Service System in Louisiana.

Q. Colonel Pritchett, how long have you been employed with the Selective Service System?

A. In this capacity?

Q. In this capacity and otherwise.

A. Well, in this capacity approximately three years and nine months, and then for fourteen years prior to that, I represented the Director of Selective Service in five southwestern states as Appeals Representative, [89] and then prior to that, during World War II, I served as a member of the staff of the State Headquarters in Alabama.

Q. Just briefly, Colonel Pritchett, what are your duties in your present capacity?

A. Well, my duties are to review the files of registrants who were delinquents prior to their being reported to the United States Attorney, and I review the files of every registrant that is on appeal, and goes up to the Presidential Appeal Board in the State, and then I review some other type files for the purpose of giving recommendations as to procedures, etc., as requested by local boards in the state.

I represent the State Director and his staff in matters where there is some question of interpretation of the law as to regulations, and so forth.

Q. What are your duties when a registrant is in violation of a Selective Service Law, Colonel?

A. Well, my duties there are to carefully review his file, his official Selective Service file, in order to ascertain whether or not the registrant has been classified in accordance with Selective Service Regulations, and in accordance with the information that is in his file, and to ascertain if he has been accorded all his rights under the Selective Service Laws and Regula-[90] tions, and if, for example, I find that he has been processed in accordance with Selective Service Regulations and that he has been accorded all his rights, then I recommend, if he is a delinquent, I recommend to the Board that he be reported to the United States Attorney.

Q. Colonel Pritchett, in regard to a man's classification by the Board, and so forth, do the regulations prescribe the manner in which the Board is to classify a person?

A. Oh, yes, it does. They have varying and changing classifications as situations and conditions change, and that goes on all the time, and the Draft Board keeps a record of those changes, and the registrant is obligated by law to report any change in his status so that the classification can be constantly kept up to date pending his possible induction into the service.

Q. Colonel Pritchett, when a man's classification is changed from, say, 2–S to 1–A, what does that indicate, as far as the Board is concerned?

A. That indicates that he has been classified, or reclassified as 1–A, because he is to be made available for induction.

Q. Colonel Pritchett, did you in fact review the file of the defendant in this case?

[91] A. Yes. I reviewed the file of Raymond Joseph Duvernay, a registrant of Local Board 42. However, I am not personally acquainted with Mr. Duvernay.

Q. Is this the file you reviewed?

A. Yes, it is.

Q. Colonel Pritchett, from that file, have you drawn any conclusions as to this defendant?

Mr. SMITH. Just a moment. Your Honor, I am going to object to this question, as to calling for any conclusions.

The COURT. I sustain the objection.

Mr. MERHIGE:

Q. Have you drawn any recommendations as to what action you believe should be taken in this case, under the Selective Service Act?

Mr. SMITH. I object to that question, Your Honor. He's trying to get around the objection by asking the same question in another way.

The COURT. I sustain the objection.

Mr. MERHIGE:

Q. What did you find when you reviewed this file, Colonel

[92] Pritchett?

A. I found that the registrant had been classified in accordance with the Selective Service Regulations, and, based on information that is contained in this file, I found that——

Mr. SMITH. Your Honor, that's the same thing. I'm going to object to this line of questioning, and any questioning along

this line because it's strictly conjecture and conclusions on the part of the witness, and I don't think it's admissible.

The COURT. The objection is sustained. The record speaks for itself.

Mr. MERHIGE:

Q. After reviewing the registrant's file in this case, Colonel Pritchard, what action did you take, if any?

A. I recommended to the Local Board that he be reported to the United States Attorney as a delinquent.

Q. Was he so reported?

A. He was.

Q. What was this basis for your recommendation, Colonel?

Mr. SMITH. I object to that question, Your Honor. He's asking [93] for an opinion of the witness.

The COURT. The objection is sustained.

Mr. MERHIGE. I withdraw the question.

The COURT. All right.

Mr. MERHIGE. Your Honor, at this time, the Government offers this file in evidence as rebuttal of the testimony that this man's processing was not in accord with Regulations of the Selective Service Board.

The COURT. You are offering the entire record?

Mr. MERHIGE. Yes sir, Your Honor?

Mr. SMITH. I object to the introduction of this record, Your Honor. We have had testimony by witnesses on this very thing, and that's better than any reports that might be introduced.

The COURT. The objection is overruled. It may be admitted.

[94] Mr. MERHIGE. I will mark this record for identification purposes—Government's Exhibit G–4, if the Court please.

The COURT. All right, go ahead.

Mr. MERHIGE. We have no further questions.

Mr. SMITH. No questions.

Mr. MERHIGE:

Q. Just one more question, Colonel Pritchett. Does the original notice that is sent out by the Draft Board to the registrant inform him of his rights to appeal his classification?

A. Yes sir.

Mr. MERHIGE. Thank you. I have no further questions.

The COURT:

Q. Does this record include every classification that he has had?

A. Yes sir.

Q. From the time he first registered until now?

A. Yes sir.

The COURT. All right. Any further questions?

[95] Mr. MERHIGE. No, Your Honor.

The COURT. All right, you may step down. Do you have any more witnesses?

Mr. MERHIGE. No, Your Honor; the Government rests.

The COURT. That's your case?

Mr. MERHIGE. Yes, Your Honor.

Mr. SMITH. We have nothing further, Your Honor.

The COURT. All right. Let's take a ten-minute recess.

(Recess taken.)

The COURT. All right, gentlemen, you may proceed.

(Closing arguments made to the jury by Mr. Merhige and Mr. Smith.)

The COURT. Ladies and gentlemen of the jury, I wish at the outset of this charge to caution you that indictment itself is not evidence, but only an accusation of the Government, every mat-[96]erial element of which must be established by the evidence beyond a reasonable doubt before the defendant in this case can be found guilty.

The defendant has pleaded not guilty, which means that he denies every material allegation of the indictment. This places the burden of proof on the Government to show beyond a reasonable doubt that he is guilty of the charge made in the indictment, before he can be convicted.

To carry that further, the Government must establish every material element of the offense as charged, beyond a reasonable doubt, to a moral certainty.

It is my duty to tell you what the law that governs this case is. It is your duty to accept the law as it is given to you by the Court, and it is your duty to determine for yourselves what the facts of the case are, and to apply the law to the facts as you find them. I say to you also that the arguments of Counsel are not evidence. They are merely intended to assist you in understanding the respective theories and the contentions of the [97] prosecution and the defense.

You as jurors are the sole judges of the credibility of the witnesses, and in determining the credibility of a witness and the weight to be attached to his testimony, you may, among other things, consider his manner and demeanor on the witness stand, his feelings, interests, prejudice or bias, if any, whether

he is impartial or otherwise, and whether he has a purpose or interest to serve that might color his testimony, the means of knowing what he testified to, the probability or improbability of his testimony, the consistency or inconsistency of his statements, and with the other facts proved in the case, the reasonableness or unreasonableness of his testimony, and all the other circumstances surrounding his testimony, including whether or not he has been contradicted by other credible testimony.

You are not bound to believe unreasonable statements just because they are sworn to. In other words, we know that anyone can swear to anything if he has the courage to do so.

[98] If any witness has wilfully and falsely testified regarding material points, you may disregard his entire testimony unless it is corroborated by other credible evidence.

If conflicts in the testimony of witnesses exist, it is your duty to reconcile them without imputing perjury to anyone, if you can reasonably do so. If you cannot reasonably do so, you must give credence to those witnesses whom you believe most worthy of belief.

The credibility of the witnesses and the weight to be attached to their evidence are matters within your province. You are the exclusive judges as to where the truth lies.

If a witness is shown knowingly to have testified falsely concerning any material matters, you have a right to distrust such witnesses' testimony in other particulars, and you may reject all the testimony of that witness, or give it such credibility as you may think it deserves.

Now, to impeach a witness' testimony means to impute some fault or defect to, or [99] bias, in validity, etc., to bring or throw discredit on; to call in question; to challenge; as to impeach one's motives or conduct; specifically to challenge, or discredit the credibility of, as of a witness.

The law presumes the defendant to be innocent of the crime. Thus, a defendant, although accused, begins a trial with no evidence against him, and this presumption of innocence continues throughout the trial to its end, that the defendant is innocent of the things charged against him.

The law does not require of a defendant that he prove his innocence if a reasonable doubt exists in the case. The burden of proof is upon the government to prove his guilt by the evidence beyond a reasonable doubt.

This principle of law is not mere idle theory, but it must be followed by you, so if there are two reasonable theories, equally supported by the evidence, one of which is consistent with the guilt of the defendant, and the other consistent with his innocence, you must adopt that theory consistent with [100] the evidence and acquit him, because he could not be said to be guilty beyond a reasonable doubt.

The term "reasonable doubt" does not mean just any possible doubt that you might have, but it means such reasonable doubt that a careful, prudent and reasonable man ought to have if, after hearing all the evidence, he is not convinced to a moral certainty that the defendant is guilty of the charge, if there is a reasonable doubt in your mind about the guilt of the defendant of the charge contained in the indictment.

It does not mean a whimsical doubt, nor does it mean a possible doubt created by the reluctance on the part of a juror to perform an unpleasant task. It means a doubt arising out of the Government's possible failure to have proven the charges contained in the indictment.

To find a verdict of guilty, you must, after a consideration of all the evidence, be able to say conscientiously that you feel to a moral certainty that the charges are true, and have been proved beyond a reasonable [101] doubt.

If there is a reasonable doubt in your minds, you should acquit him of the charge; if there is no reasonable doubt in your minds, then you should find him guilty of the charge.

Now, ladies and gentlemen, I will read the indictment to you, and you will keep in mind, as I stated before, that an indictment is not evidence or not proof of wrongdoing. An indictment is merely an accusation by the Government, and as I stated, the defendant begins a trial with a presumption of innocence, and to return a verdict of guilty, the Government must prove his guilt beyond a reasonable doubt. As I said before, the burden is not on the defendant to prove himself innocent. He is presumed to be innocent. He begins the trial with that presumption.

Now, I will read the indictment. The Grand Jury charges that on or about the 20th day of May, 1966, in the New Orleans Division of the Eastern District of Louisiana, Raymond Joseph Duvernay wilfully and knowingly did fail and neglect to perform a duty required of him under and in the execution of the Uni- [102] versal Military Training and Service Act and the

rules, regulations, and directions duly made pursuant thereto, in that he did fail, neglect and refuse to comply with an order of his local board to submit to induction into the armed forces of the United States; all in violation of 50 APP, USC 462.

Now, the word "wilfully" means to do something unlawfully. It means to do something that is contrary to law.

The purpose of adding the word "knowingly" in the indictment was to make certain that no one is convicted for an act done because of a mistake or inadvertence or other reason.

An act is done wilfully if done voluntarily and purposely, with specific intent to do that which the law forbids; that is to say, with bad purpose, to disobey or disregard the law.

The defendant has raised the defense through his counsel that his classification by this particular Draft Board was arbitrary and without any basis in fact. That is something that you as jurors are going to have to [103] determine after considering all the evidence that has been presented in this trial.

Now, this defendant has been charged specifically with failing and neglecting to perform a duty required of him under and in the execution of the Universal Military Training and Service Act. Now, I will read the pertinent part of that Act, which was set up by Congress for the security of this country, as set out in Title 50, App., Section 451:

> "(a) This Act may be cited as the Universal Military Training and Service Act.
>
> "(b) The Congress declares that an adequate strength must be achieved and maintained to insure the security of this nation.
>
> "(c) The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy.
>
> "(d) The Congress further declares, in accordance with our traditional military pol-[104]icy as expressed in the National Defense Act of 1916, as amended, that it is essential that the strength and organization of the National Guard, both ground and air, as an integral part of the first line defenses of this Nation, be at all times maintained and assured.

330-562—69——5

"To this end, it is the intent of the Congress that whenever Congress shall determine that units and organizations are needed for the national security in excess of those of the regular components of the ground forces and the air forces and those in active service under this title, the National Guard of the United States, both ground and air, or such part thereof as may be necessary, together with such units of the Reserve components as are necessary for a balanced force, shall be ordered to active Federal service and continue therein as long as such necessity exists.

"(e) The Congress further declares that adequate provision for national security requires maximum effort in the use of scientific research and development, and the fullest pos-[105]sible utilization of the Nation's technological, scientific, and other critical manpower resources.

"Except as otherwise provided in this Title, it shall be the duty of every male citizen of the United States, and every other male person now or hereafter in the United States who, on the day or days fixed for the first or any other subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

"The selection of persons for training and service under Section 4 shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service, and who at the time of selection are registered and classified, but not deferred or exempted.

"Provided, that in the selection of per-[106]sons for training and service under this Title, and in the interpretation and execution of the provisions of this Title, there shall be no discrimination against any person on account of race or color.

"Provided further, that in the classification of registrants within the jurisdiction of any local board, the registrants of any particular registration may be classi-

fied, in the manner prescribed by and in accordance with rules and regulations prescribed by the President before, together with, or after the registrants of any prior registration or registrations; and in the selection for induction of persons within the jurisdiction of any local board and within any particular classifications, persons who were registered at any particular registration may be selected in the manner prescribed by and in accordance with the rules and regulations prescribed by the President, before, together with, or after persons who were registered at any prior registration or registrations."

All twelve of you must agree on a verdict, and although you are to determine in [107] your own minds whether you feel the defendant is innocent or guilty on every count, you are, of course, to confer with each other with regard to the evidence produced at the trial.

In other words, you are to have an open mind in discussing the facts and circumstances of the case with your fellow jurors. Your verdict must be unanimous.

You will select your own foreman when you get into the jury room, and the foreman will write the verdict on this form and sign it.

Are there any suggestions, gentlemen?

Mr. MERHIGE. None, Your Honor.

Mr. SMITH. I would just like to make my objections for the record, if the Court please.

The COURT. Well, you may do that after the jury retires. All right, the Marshal will attend the jury. Court will stand recessed.

Mr. SMITH. Counsel for the defendant would object to the Court's instructions to the jury, particularly [108] with the reading of the regulations of the Selective Service Universal Military Training Act, and to the failure of the Court to give defendant's proposed charge No. 1, which reads as follows:

"A registrant is entitled to full and fair disposition of his contentions at every level of the Selective Service System, and arbitrary and capricious denial of due process makes void an order of induction based thereon, citing U.S. vs. Peebles, 220 Fed. 114, and Atkins vs. The

United States, 204 Fed. 269, and United States vs. Coon, 153 Fed. Supp. 96."

The COURT. Ladies and Gentlemen of the jury, have you reached a verdict?

The FOREMAN. Yes, Your Honor.

The COURT. Pass it up, please. Read the verdict.

The CLERK. No. 30,439, United States of America vs. Raymond Joseph Duvernay, "We the jury find the de-[109]fendant guilty. Dated: August 30, 1966. Signed, John F. Cado, Foreman."

The CLERK. Ladies and Gentlemen of the Jury, is that your verdict?

The COURT. Let the defendant be seated. Do you wish to have the jury polled?

Mr. SMITH. No, I don't think so, Your Honor. I would like to move the Court for delay in sentencing, however, and ask that the defendant be released on his bond.

The COURT. Well, let the verdict be recorded. The jury may be excused, subject to call.

(Jury leaves the court room.)

The COURT. Mr. Smith?

Mr. SMITH. Your Honor, I would like to respectfully request that sentence be deferred for a period the Court thinks proper, and I would request that the defendant be released on his same bond.

[110] The COURT. Well, I am not going to continue him on his same bond.

Mr. SMITH. If the Court please, he has been out on bond all this while, and I have never had any difficulty in getting in touch with him. I am sure if Your Honor would release him under the same bond, he would be here for sentencing at whatever time the Court says. He is not going to leave town.

The COURT. He may now. He's not the same risk as he was before the trial. He stands convicted. I am going to deny his old bond and set a new bond at five thousand dollars, and he is not to be allowed to sign his own bond. All right, let him be remanded. Court will stand recessed.

MINUTE ENTRY:
August 30, 1966
CHRISTENBERRY, J.

Division "A"
Criminal No. 30439

[Title omitted in printing]

This cause came on this day for trial.

PRESENT: Gene S. Palmisano, Esq.
Louis B. Merhige, Esq.
Assistant U.S. Attorneys
Benjamin E. Smith, Esq.
Attorney for Defendant

All present and ready.

Counsel for defendant requested that the Jury panel be excluded from the Courtroom so that a preliminary matter might be taken up with the Court; same was GRANTED by the Court.

Counsel for defendant called for appearances of the witnesses who were issued Subpoenas Duces Tecum.

Witnesses were called and all answered present.

Counsel for defendant moved that these witnesses be separated; same was GRANTED by the Court. Witnesses were called and separated.

The following witness was called by the defendant for the purpose of protecting the record in regards to a former motion of defendant to quash:

Mrs. Cecile Calme, Sworn by Deputy Clerk.

With leave of Court, a stipulation was made by and between counsel for the defendant and the United States that the other witnesses would testify in accordance with Mrs. Calme's testimony, if they were called.

Jury panel returned into the Courtroom.

Jurors were called, and sworn on their Voir Dire and, being found acceptable, were sworn to try the case.

Jurors

Mrs. Pauline M. Parquet
Mrs. Diane M. Badock
Joseph H. Palmer
Mrs. Blanche E. Thomas
Mrs. Josephine C. Aiple

Harold J. Theard
Claude J. Landeche
Mrs. Estelle W. Brown
Mrs. Germaine Q. Gautreaux
Maurice P. Gaudet, III
Louis E. Capdevielle
John F. Cado

Counsel for defendant moved for the separation of all witnesses, and for the United States to supply the defendant with a copy of the defendant's file in this cause; same were GRANTED by the Court.

Balance of Jury panel was excused subject to call.

Witnesses were called, sworn by the Deputy Clerk, instructed by the Court, and excluded from the Courtroom.

United States addressed the Jury.

Counsel for Defendant addressed the Jury.

The following witnesses were called and testified on behalf of the United States:

Mrs. Cecile Calme, Recalled; Previously sworn.

Mr. and Mrs. Duvernay, parents of the defendant, were called, instructed by the Court, sworn by the Deputy Clerk, and excluded along with the other witnesses.

Court instructed the Jury not to discuss this case with anyone, etc., and excused the jury from the Courtroom.

United States orally moved to strike all testimony taken during the cross-examination of the witness, Mrs. Cecile Calme, and dictated the reasons into the record; same was OVERRULED by the Court.

Jury was called, and returned to the Jury box.

Testimony of the United States witnesses continued:

Specialist Philip J. Perkins, Previously sworn.

Lt. Keith Harrington, Previously sworn.

Lt. Ignatius J. Costa, Jr., Previously sworn.

United States rested.

United States orally moved for the production of the Local Board Minutes; United States objected to same.

IT IS ORDERED BY THE COURT that the objections of the United States to defendant's motion for the production of the Local Board Minutes be, and the same are hereby, OVERRULED, and the motion for production is GRANTED.

The following witnesses were called and testified on behalf of the defendant:

Raymond Joseph Duvernay, Sworn by Deputy Clerk.
Mrs. Raymond Duvernay, Previously sworn.
Florian J. Lizana, Previously sworn.
Roy J. Martin, Previously sworn.
Sidney A. Bozonier, Previously sworn.
Defendant rested.

The following witness was called to testify in rebuttal on behalf of the United States:

Col. Douglas Pritchett, Sworn by Deputy Clerk.
United States rested.
Argument.
Rebuttal.
Court charged and instructed the jury.
Jury retired to deliberate.

Jury returned from deliberation and rendered the following verdict:

"We, the Jury, find the defendant GUILTY

"Dated: August 30, 1966.

(Signed) JOHN F. CADO
Foreman"

Court ordered that the verdict be recorded.
Jury was excused subject to call.

Counsel for defendant orally moved to have Sentencing in this matter continued; same was GRANTED by the Court.

Counsel for defendant orally moved that defendant be released on his same bond; same was DENIED by the Court.

IT IS ORDERED that the new bond as to defendant, Raymond Joseph Duvernay, be, and the same is hereby, set in the amount of $5,000.00, and that defendant not be allowed to sign his own bond.

Defendant Duvernay was remanded.

In the United States District Court for the Eastern District of Louisiana, New Orleans Division

No. 30439 Division "A" Criminal Action

[Title omitted in printing]

[File endorsement omitted]

MOTION FOR NEW TRIAL—FILED SEPTEMBER 6, 1966

NOW INTO COURT, through undersigned counsel, comes the defendant herein, who moves pursuant to Rule 33 of the

Federal Rules of Civil Procedure for a new trial on the grounds that the record shows: That Negroes were systematically excluded from the nomination and appointment process designed to furnish members to Selective Service Local Board 42; that Selective Service Local Board 42 denied your defendant due process of law and acted in his case arbitrarily and capriciously in denying him the hardship exemption he sought and applied for.

WHEREFORE, defendant moves the Court for a new trial pursuant to Federal Rules of Civil Procedure Rule 33.

Respectfully submitted,

SMITH, WALTZER & JONES
Attorneys for Defendant
1006 Baronne Building
New Orleans, Louisiana 70112
/S/ BENJAMIN E. SMITH,
Trial Attorney.

[Certificate omitted in printing]

United States District Court for the Eastern District of Louisiana

United States of America v. Raymond Joseph Duvernay

No. 30439 Criminal Division "A"

Judgment and Commitment (Rev. 7–52) September 7, 1966

On this 7th day of September 1966, came the attorney for the government and the defendant appeared in person and [1] by Counsel, Mr. Benjamin E. Smith.

IT IS ADJUDGED that the defendant has been convicted upon a verdict of Guilty by Jury on August 30, 1966 of the offense of Violation of Title 50 App. USC 462, Selective Service Act as charged [3] in the Indictment and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4] Five (5) Years.

IT IS ADJUDGED that [5]

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

HERBERT W. CHACOTENBERG,
United States District Judge.

The Court recommends commitment to: [6]

....,
Clerk.

In the United States District Court for the Eastern District of Louisiana, New Orleans Division

Criminal Action No. 30439

Division "A"

[Title omitted in printing]

[File endorsement omitted]

NOTICE OF APPEAL—FILED SEPTEMBER 6, 1966

NOW INTO COURT, through undersigned counsel, comes the defendant herein who shows to the Court:

1) That his name is Raymond Joseph DuVernay, that his address is 2006 Lapeyrouse Street, New Orleans, Louisiana.

2) That his attorney is Benjamin E. Smith of the firm of Smith, Waltzer & Jones at 305 Baronne Street, New Orleans, Louisiana.

3) That he was charged with violation of 50 App. USC, Section 462 and that he was convicted by a jury at a trial held on August 30, 1966; that he has not been sentenced, and that he is now free on bond in the amount of $5000.00.

4) That defendant-appellant is aggrieved of this verdict and feels that the law and evidence was in his favor and more particularly takes the position that the indictment was null and void inasmuch as the order for induction alleged to have been violated was in turn null and void, since same was issued by a Selective Service Board from which Negroes had been systematically excluded, and which Board acted arbitrarily and capriciously in violation of your defendant's rights to due process of law in refusing to consider or give proper hearing on defendant's applications for deferment.

WHEREFORE, defendant appeals from this verdict and judgment to United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

SMITH, WALTZER & JONES
Attorneys for Defendant
1006 Baronne Building
New Orleans, Louisiana 70112
/S/ BENJAMIN E. SMITH
Trial Attorney.

[Certificate omitted in printing]

In The United States Court of Appeals for the Fifth Circuit

No. 24132

RAYMOND JOSEPH DUVERNAY, APPELLANT,

versus

UNITED STATES OF AMERICA, APPELLEE.

Appeal from the United States District Court for the Eastern District of Louisiana.

Opinion—February 7, 1968.

Before MARIS,* THORNBERRY and AINSWORTH, Circuit Judges.

THORNBERRY, Circuit Judge: Raymond Joseph DuVernay, a twenty-two year old Negro from New Orleans, Louisiana, first registered with the Selective Service in 1964. He received a student deferment and remained in a student classification until the early part of 1966 when he left Louisiana State Uni-

*Of the Third Circuit, sitting by designation.

versity, New Orleans, which he had attended for one-half semester. He was reclassified I–A on January 19, 1966 by Local Board No. 42 in New Orleans. No administrative appeal was taken from the I–A classification. On April 13, 1966 he was ordered to report for induction on May 20, 1966. Subsequent to this order, he attempted to obtain first a student deferment, then a hardship deferment, and finally an occupational deferment.[1] The local board refused to grant him a personal appearance or to reopen the matter of his classification. His efforts to obtain a deferment having failed, he reported to the Induction Center on May 20 and informed the officers in charge that he would refuse to be inducted. The consequences of a refusal to be inducted were explained, but at the critical moment he declined to take the required one step forward. On August 30, 1966, he was convicted by a jury of violating the Universal Military Training and Service Act, 50 U.S.C. App. § 462, and was given a five-year sentence by the court.

On this appeal, DuVernay relies principally on the argument that the indictment against him should have been dismissed by the district court because Negroes have been systematically excluded from membership on Local Board No. 42. The Government stipulates that no Negroes have served on the local board for the last five years, and appellant accepts this stipulation as the factual basis for his argument. In addition to this contention, he alleges that he is entitled to a new trial because the local board's method of handling his case reflects a denial of due process. Finally, it is alleged that the trial judge committed reversible error when he refused to permit questions concerning the Ku Klux Klan affiliations of the man who was chairman of the board when appellant was classified I–A.

We affirm the conviction on the ground that all of appellant's contentions are foreclosed by his failure to exhaust administrative remedies. The Selective Service Regulations, 32 C.F.R. §§ 1602–1690 (1966), provide for appeal from a local board's determination of an individual's draft status. This appellate procedure is explained on the card bearing notice of classification and can be further elucidated by local-board personnel. There is no evidence that DuVernay was unfamiliar with this procedure or was incapable of understanding it. On the con-

[1] Appellant was employed by the Social Welfare Planning Council, an anti-poverty agency.

trary, the fact that he was able to correct an erroneous classification made by the board while he was still in high school indicates his awareness of the importance of taking immediate steps to correct a classification one believes to be erroneous. Yet, he made no effort to appeal his I–A classification until he received an order of induction. By this time he had waived his administrative remedies. Section 1624.1(a) of the regulations requires as a first step in the appellate process that a registrant file a written request for personal appearance before the board within ten days from the time the board mails a notice of classification. After the ten-day period has expired, there can be no personal appearance.[2] Since he waived his right to a personal appearance and his subsequent right to appeal, the only administrative avenue left open to appellant was a written request for reopening of classification based on facts not considered by the board when he was classified. This remedy is provided by Section 1625, but the board is powerless to reopen a classification after the order of induction has been mailed unless it specifically finds there has been a change in the registrant's status resulting from circumstances over which he had no control.[3] There is no evidence that DuVernay's status

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[2] 32 C.F.R. § 1624.1(a) provides as follows:

Every registrant after his classification is determined by the local board, except a classification which is determined upon an appearance before the local board under the provisions of this part, shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended.

[3] 32 C.F.R. § 1625.2 provides as follows:

The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically find there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

changed in this way after the order of induction was mailed. Thus, the mailing of the order of induction extinguished his last right of administrative appeal before he had even begun to challenge his I–A classification.

When a registrant believes he is entitled to a fair hearing on the matter of his classification, he may appear personally before the local board and thereafter may carry his case to a board of appeal and, under certain circumstances, to the President. Only when he has resorted to these administrative remedies within the prescribed time limits, has been ordered by his board to report for induction, and has obeyed that order, are the doors of the courts open to him to test the legality of his classification. *Falbo v. United States,* 1944, 320 U.S. 549, 64 S.Ct. 346, 88 L.Ed. 305; *Barnes v. United States,* 5th Cir. 1967, No. 24745, December 14, 1967; *Thompson v. United States,* 10th Cir. 1967, 380 F.2d 86; *Woo v. United States,* 9th Cir. 1965, 350 F.2d 992; *Badger v. United States,* 9th Cir. 1963, 322 F.2d 902, *cert. denied,* 1964, 376 U.S. 914, 84 S.Ct. 669, 11 L.Ed.2d 610; *Frank v. United States,* 9th Cir. 1956, 236 F.2d 39; *Skinner v. United States,* 9th Cir. 1954, 215 F.2d 767, *cert. denied,* 1955, 348 U.S. 981, 75 S.Ct. 572, 99 L.Ed. 763; *Van Bibber v. United States,* 8th Cir. 1945, 151 F.2d 444. Moreover, a registrant cannot escape the requirement that administrative remedies be exhausted by complaining, as appellant does, of a lack of due process in his local-board classification. *Evans v. United States,* 9th Cir. 1958, 252 F.2d 509; *United States v. Garth,* M.D. Alabama 1964, 239 F. Supp. 164. Since appellant failed to take administrative steps available to him before attempting a collateral attack on his classification in a prosecution for refusing to submit to induction, his contentions before this Court are foreclosed as a matter of law.[4]

It is true that in *Wolff v. Selective Service Board No. 16,* 2d Cir. 1967, 372 F.2d 817, the Second Circuit intervened in behalf of the registrants before administrative remedies had been exhausted because first-amendment rights of free speech and free assembly were at stake. The local board had reclassified the

[4] Some courts have said that the rule requiring exhaustion of administrative remedies can be relaxed under extenuating circumstances. *See, e.g., Donato v. United States,* 9th Cir. 1962, 302 F.2d 468. No such circumstances have been demonstrated in this case.

registrants from student-deferred to I–A because of their participation in demonstrations protesting American involvement in Viet Nam. While acknowledging the general rule that administrative remedies must be exhausted in a selective service case, the court focused on three separate factors compelling immediate judicial relief for the registrants. First, it said that first-amendment rights are not involved in the normal case, whereas in the case at bar, the very fact of the reclassification operated to curtail the exercise of these rights. Since the reclassification by the local board undoubtedly had a chilling effect on the exercise of free speech, immediate judicial action was justified. Second, it said that the registrants should not be required to perform a futile task. They were part of a larger group of demonstrators, some of whom had already appealed their reclassifications without success. The policy of local and appellate boards with respect to student demonstrators having been clearly established, it would be useless to require the appellants to exhaust administrative remedies. Finally, the court cited authority for the proposition that judicial intervention may occur at any time when a local board "acts in flagrant disregard of the applicable regulations and thus in clear excess of its jurisdiction." 372 F.2d, at 826.

Taking these three factors into account, we find no basis for departing from the general rule in the instant case. It is apparent that DuVernay was not reclassified as a penalty for exercising first-amendment rights, and it is equally apparent that it would not have been a futile gesture for him to exhaust administrative remedies. The record reveals that he always received a student classification upon timely request; and there is no reason to believe that the local board, or at least the appeal board, would not have granted another deferment if legitimate reasons had been presented within the prescribed time limits. The fact is that under the regulations, the board had no alternative but to reclassify appellant as I–A: He had dropped out of school, and his file presented no other basis for a deferment. We might add that his I–A status was determined at a time when the board had no way of knowing his race. That is, at the time of classification, there was no way of determining DuVernay's race from his file. Thus, we conclude that the board acted in accordance with the regulations. We further conclude

that appellant could have obtained a deferment subsequent to his reclassification if he had taken the appropriate steps and given appropriate reasons.

Though we do not believe the reasoning of *Wolff* is applicable to the instant case, we are moved to express doubt as to the continuing validity of that decision. Congress amended 50 U.S.C. App. § 460(b)(3) in 1967, several months after the decision in *Wolff*, in such a way as to emphasize that exhaustion of administrative remedies is a prerequisite to judicial review:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

The purpose of the amendment is revealed by legislative history:

> The committee was disturbed by the apparent inclination of some courts to review the classification action of local or appeal boards before the registrant had exhausted his administrative remedies. Existing law quite clearly precludes such a judicial review until after a registrant has been ordered to report for induction and has responded either affirmatively or negatively to such an order. In view of this inclination of the courts to prematurely inquire into the classification action of local boards, the committee has rewritten this provision of the law so as to more clearly enunciate this principle. The committee was prompted to take this action since continued disregard of this principle of the law by various courts could seriously affect the administration of the Selective Service System.

H.R. Rep. No. 267, 90th Cong., 1st Sess 30–31, 7 U.S. Code Congressional and Administrative News 1464, 1489 (1967). Faced with a factual situation almost identical to the one in *Wolff*, a district court recently held that the new amendment and its legislative history preclude judicial review before administrative remedies have been exhausted. *Carpenter v. Hendrix*, 36 U.S.L.W. 2349 (N.D. Ga. December 19, 1967).[5]

In summary, we hold that the arguments advanced by appellant go to the legality of his classification and that this matter is foreclosed by his failure to exhaust administrative remedies. Even if there can be exceptions to this general requirement, which we doubt, we find no basis for making an exception to it in this case. The judgment of the district court is

AFFIRMED.[6]

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[5] In *United States v. Lybrand*, 36 U.S.L.W. 2373 (E.D. N.Y. January 2, 1968), a district court recently held that the new amendment does not foreclose the power of courts to consider—in a criminal prosecution for refusal to submit to induction or report for civilian work—jurisdictional errors other than those pertaining to classification. This holding would not appear to be inconsistent with the statute.

[6] We note in passing that there is at least one problem with appellant's attack on the racial composition of his local draft board. Draft board members are public officers under authority derived from the President. In challenging the racial composition of the board, appellant indirectly challenges the qualifications of the present members and their eligibility to perform their duties. The general rule is that where one is a public officer under color and authority derived either from election or appointment, however irregular or informal, and where he discharges his duties in behalf of the public or in public interests, his qualifications are not subject to collateral attack, as in this criminal proceeding, but must be challenged by direct attack. *Ex parte Ward*, 1899, 173 U.S. 452, 19 S.Ct. 459, 43 L.Ed. 765; *Jessen v. United States*, 10th Cir. 1957, 242 F.2d 213; *United States ex rel. Doss v. Lindsley*, 7th Cir. 1945, 148 F.2d 22; *United States ex rel. Watkins v. Pennsylvania*, W.D. Pa. 1963, 214 F. Supp. 913. In *United States v. Richmond*, C.D. Calif. 1967, 274 F. Supp. 43, also a criminal prosecution for refusal to submit to induction, the district court held that this rule barred a collateral attack on the racial composition of the defendant's local draft board.

In the United States Court of Appeals for the Fifth Circuit

OCTOBER TERM, 1967

No. 24132

D.C. Docket No. CR 30439 "A"

RAYMOND JOSEPH DUVERNAY, APPELLANT,

versus

UNITED STATES OF AMERICA, APPELLEE.

Appeal from the United States District Court for the Eastern District of Louisiana

Before MARIS,* THORNBERRY and AINSWORTH, Circuit Judges.

JUDGMENT—FEBRUARY 7, 1968

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

In the United States Court of Appeals for the Fifth Circuit

No. 24132

[Title omitted in printing]

[File endorsement omitted]

Appeal from the United States District Court for the Eastern District of Louisiana

MOTION FOR REHEARING—FILED MARCH 26, 1968

AND NOW INTO COURT, through undersigned counsel, comes Raymond Joseph DuVernay, defendant below and now

*Of the Third Circuit, sitting by designation.

appellant, who shows to the Court that the Court's decision and opinion affirming his conviction of February 7, 1968 is contrary to the law and evidence and that there should be granted a re-hearing or a hearing en banc reversing the decision of the Court and either modifying or overturning the opinion in support of said decision affirming said conviction.

SMITH, SCHEUERMANN & JONES
Attorneys for Appellant
1006 Baronne Building
New Orleans, Louisiana
Phone: 525-4361
/S/ BENJAMIN E. SMITH

[Certificate omitted in printing]

In the United States Court of Appeals for the Fifth Circuit

No. 24132

[Title omitted]

[Filed endorsement omitted]

Appeal from the United States District Court for the Eastern District of Louisiana

OPINION DENYING ON PETITION FOR REHEARING EN BANC—MAY 14, 1968

Before MARIS,* THORNBERRY and AINSWORTH, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 25(a), subpar. (b), the Petition for Rehearing En Banc is DENIED.

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*Of the Third Circuit, Sitting by Designation.

GOVERNMENT'S EXHIBIT 4 (EXCERPT)

1438 SAINT ANTHONY STREET,
New Orleans, La.,
August 2, 1964.

LOCAL BOARD NO. 42,
701 Loyola Street,
New Orleans, La. 70113

GENTLEMEN: I request a personal appearance before the local board to discuss the changeing of my classification from I–S–H to I–A. My Selective Service No. is 16,42,46,32.

I am still attending school, and can produce written or personal proof of my school attendance.

Respectfully Yours,

RAYMOND J. DUVERNAY.

GOVERNMENT'S EXHIBIT 4 (EXCERPT)

AUGUST 4, 1964.

RAYMOND J. DUVERNAY,
1438 St. Anthony St.,
New Orleans, La.

DEAR SIR: In answer to your letter of August 2, 1964 requesting an appearance before the board to discuss the changing of your classification from 1–S–H to 1–A, also advising that you are still attending school.

On June 19, 1964 you were mailed a "current information Questionnaire" and written in "red" in the center of the form was the following.

"Series V–Education must be completed fully, as it is important for further deferment as a student."

You completed in the above series, line 1 and 2, you did not *complete* 3, so we assumed that you were no longer a student. Since you failed to affix your signature to the form, I am returning same to you, also complete *line 3* and your problem will be solved. May I also advise you at this time, when you enroll in high school in September you will have to have the school submit verification of your enrollment.

Yours truly,

CECILE S. CALMES,
Clerk, Local Board No. 42,
(By Direction of the Board).

DUVERNAY 7

Selective Service System, Minutes of Local Board Meeting,

Date of this meeting: January 19, 1966.
Hour this meeting convened: 7:00 p.m.
Date of last meeting: November 17, 1965.
Names of members present: Mr. Jack Helm, Chairman, Mr. Sidney A. Bozonier, Secy., Mr. F. J. Lizana, Mr. Richard A. Audler, Mr. Roy J. Martin, Members.
Minutes of previous meeting read, approved and signed.
The classifications of 584 registrants, listed on the continuation sheet of this form, were determined by a majority vote of the local board.
Other local board minutes:
Request for an occupation deferment filed by the Department Police in behalf of Harold W. Gervais, 16–42–43–49 was given consideration by the board. Request was granted, classification re-opened and registrant classified 2–A. Both registrant and the Department of Police was notified of the board's action.
The board reviewed information submitted by the New Orleans Regional Mental Health Center relative to an occupational deferment for John V. Cabibi, 16–42–42–437. Registrant's classification was not re-opened and employer notified of board's action.
The board removed the delinquency on the following registrants. Ronald L. Fernandez, 16–42–44–370, Leonard J. Hamilton, 16–42–45–601, Sylvester Marshall, 16–42–45–541.

GOVERNMENT'S EXHIBIT 4 (EXCERPT)

SELECTIVE SERVICE SYSTEM—MINUTES OF ACTION—CONTINUATION SHEET

Name of Registrant or Standby Reservist: Raymond Joseph DuVernay.
SS or SR Number 16–42–46–32

Dates	Minutes of actions	Vote	
		Yes	No
April 27, 1966	Information submitted by registrant and his mother as of 4–27–66 reviewed and classification not reopened. S. Bozonier.	4	0
May 23, 1966	Classification reviewed and not reopened. S.B	3	0

Registrants Robert Lee Weems, 16–42–47–703, Richard Allen Gowell, 16–42–47–706, Johnnie Coleman, 16–42–47–758, Earl John Thonn, Jr. 16–42–47–824 was classified 1–Y under Adm. Cir. 502.12.

Registrants Morris R. Caldwell, 16–42–46–312, David A. Bybee 16–42–47–624 were classified 1–Y by the local board for physical reasons.

Registrant Clifford McMillian, Jr. 16–42–47–827 was classified 4–F by the local board for physical reasons.

The board cancelled the registration of Henry W. Kinney, 111, 16–42–47–757 under SSR 1619.13.

Registrants Jerome R. Turner, 16–42–47–2, Michael D. Winter, 16–42–43–443 were classified "deceased" by the local board.

The military file of Douglas L. Ealy, 16–42–44–337, US 54–362–709 was placed before the board for review. Information reviewed and it was the recommendation of the board that registrant be retained in service.

The board reviewed Adm. Cir. 502.11 and Hq. Memorandum No. 253.

There being no further business, meeting adjourned.

Hour adjourned: 10:00 p.m.

_____ _____,

(Signature of Local Board Member)

COUNSEL'S NOTE: "There follow 25 sheets containing 584 names of registrants whose classifications were considered at said meeting. In each instance the vote was 5–0. DuVernay's name appears on page 10 thereof with the notation of re-classification from 2–S to 1–A by vote of 5–0."

DUVERNAY 5

Selective Service System, Report of Oral Information

Selective Service or Standby Reserve No. 16–42–46–32

Information received by personal visit.

1. Name (last, first, middle): Duvernay, Raymond Joseph.

2. Date of birth: 1–20–46.

3. Present mailing address: 2006 Lapeyrouse St., New Orleans, La.

4. New information (marriage, employment, dependency; death of registrant, reservist, or claimed dependent): 4–15–66.

Registrant came into the office relative to his receiving an induction order. Said he wanted a deferment on the grounds that

he was planning on going back to college in September 1966. He was advised in order to be deferred he would have to be presently enrolled in school. He then advised that he had charges pending against him in court and I advised him that in March 1966 he was processed for A.F.P.E. and found to be fully acceptable, that he should have revealed these pending charges to the Induction Station and to his local board. He stated he did advise them at the induction station—but that had nothing to do with his being found acceptable, as he was acceptable on mental and physical reasons. He was very belligerent, and in trying to determine what charge or charges were pending in the court against him, he stated he was arrested in October 1963 for being loud and boisterous at a Civil Rights Rally, said he never heard anything from anybody (he was referring to this charge) so he didn't know if it was still pending. He also advised there were no other charges (court) other than this one. He was then advised it would be up to him to produce evidence relative to this charge since the information he furnished was so vague. He said he would try and find out and then left the office.

5. Source of information: Registrant.

_____ _____,

Clerk, Local Board No. 420.

Date: 4–15–66.

DUVERNAY 1

Selective Service System, Report of Oral Information

Selective Service or Standby Reserve No. 16–42–46–32.

Information Received by Personal Visit.

1. Name (Last, first, middle): Duvernay, Raymond Joseph.
2. Date of birth: 1–20–46.
3. Present mailing address: 2006 Lapeyrouse St.
4. New information (marriage, employment, dependency; death of registrant, reservist, or claimed dependent): April 25, 1966.

Mrs. Duvernay, mother of registrant Raymond Duvernay reported to the board relative to an induction order her son received, scheduled date of May 20, 1966. I advised Mrs. Duvernay that her son Raymond had reported to the board relative to the same matter—and requested a deferment because he planned to go back to school in September. While she was in the office she submitted the following information. Graduated

from high school in June 1965, enrolled in LSUNO in September 1965 and resigned in December 1965. She advised his godmother paid his tuition. She further claimed he started working with the Housing Authority in January 1966 (maintenance) salary $215.00 per month and claimed he gave her $25.00 per week. Removed himself from that job and started working at the Welfare Planning Council, 211 Camp Street, salary $275.00 per month, has had one pay period, gets paid every two weeks and mother claims he gave her $70.00 for two weeks. Registrant does not reside with his mother, lives with his grandmother at 2006 Lapeyrouse Street, has been living with grandmother over a year—although mother claims it is only temporary. Mother employed at Charity Hospital, Laundry Department, salary $195.00 per month. Has other children ages, 9, 11, 12, 14, 16, 17. The 17 year old stays at home. Mrs. Duvernay states that she has not lived with her husband in four years, does not receive any other income except her salary, however her inlaws help her out sometimes—when they feel like it. She does not know the whereabouts of her husband and neither does her inlaws know his whereabouts. States she pays $55.00 a month rent.

I advised Mrs. Duvernay that I would submit this information to the board and also the information submitted by her son for board action, on the date of the meeting which was not definite at this time.

5. Source of information: Relative.

6. Name and address of person furnishing information, other than registrant: Mrs. Shirley Duvernay (mother).

Clerk, Local Board No. 42.

Date: 4–25–66.

DUVERNAY 8

Selective Service System, Minutes of Local Board Meeting

Date of meeting: April 27, 1966.

Hour this meeting convened: 7:00 p.m.

Date of last meeting: March 23, 1966.

Names of members present: F. J. Lizana, Acting Chairman, Sidney A. Bozonier, Secy., Roy J. Martin, Richard A. Audler, Members.

Minutes of previous meeting read, approved and signed.

The classifications of 234 registrants, listed on the continuation sheet of this form, were determined by a majority vote of the local board.

Other local board minutes:

The file of Sidney E. Wiltz, 111–16–42–44–394 was placed before the board for consideration of an apprentice classification, relative to the filing of SSS Form 171. Under the provisions of SSR 1622.22 registrant's classification was reopened and classified 2–A (App.) The Apprentice Committee was notified of the board's action.

Board action was taken on the files of John H. Haslauer, 16–42–40–407 and Leo Paul Purcell, 16–42–43–183 for further consideration of their 3–A classification based on hardship. Current information filed was considered by the board and it was the board's opinion that the hardships still existed and further deferment was granted.

Request for an occupational deferment submitted by The Union Carbide Corporation on Terry J. Hiserodt 16–42–43–565, employed as a mechanical engineer was reviewed and given consideration by the board. Registrant's classification was reopened and classified 2–A, thereby advising the Union Carbide Corporation of the board's action on their request.

Request for deferment filed by the Department of Police in behalf of William T. Roth, 16–42–45–214, scheduled for induction and presently in attendance at the Police Academy was acted on by the board. The board concurred in granting the deferment, thereby requesting the State Director to cancel registrant's induction. The board's attention was called to the submission of Form PC–243 (Request for deferment or waiver for Peace Corps Service) on registrant Donald R. Dicken, 16–42–42–457 to begin training on June 1966 and presently classified in 2–A to expire 9–23–66. This 2–A was based on a request by The General Electric Corporation as registrant being essentially employed in the Flight Propulsion Division. The board carefully reviewed contents of the file and in view of the above, it was their opinion that registrant should be notified, that should he remove the reason for which he was granted a deferment, that the board would have no alternative but to classify him in a class available for service. Copy of letter to General Electric and a request to General Electric to advise the board immediately, should registrant leave their employ.

Registrant Carl L. Coste, 16–42–48–199 was classified 1–Y by the board under Adm. Cir. 502.12.

Registrant Rodney Atlow, 16–4248–97 was classified 4–F by the board for mental reasons.

Registrant Paul J. Tircuit, III was classified 4–F by the board for physical reasons.

The delinquency status of Eugene Grady, 16–42–47–70 was removed by the board.

At the request of Mr. Raymond Molony, the board submitted the names of Mr. Robert Schedler and Mr. George J. Gasperecy as potential board members.

There being no further business, meeting adjourned.

Hour adjourned: 10:25 p.m.

_____

(Signature of Local Board Member).

COUNSEL'S NOTE: "There follow 10 sheets containing 234 names of registrants whose classifications were considered at said meeting. In each instance the vote was 4–0. DuVernay's name does not appear anywhere in these official Board minutes."

DuVernay 4

April 28, 1966.

Raymond Joseph DuVernay,
2006 Lapeyrouse St.,
New Orleans, La.

Dear Sir: At the board meeting held on April 27, 1966, the information submitted by you and your mother was given careful consideration.

It is the opinion of the Local Board that you should report for induction, as ordered, on May 20, 1966.

Yours truly,

Cecile S. Calmes,
Clerk, Local Board No. 42
(By Direction of the Board).

DuVernay 2

Selective Service System, Report of Oral Information

Selective Service or Standby Reserve No.—16–42–46–32.
Information received by personal visit.

1. Name (Last, first, middle): DuVernay, Raymond Joseph.
2. Date of birth: Jan. 20, 1946.

3. Present mailing address: 2006 Lapeyrouse St., New Orleans, La.

4. New information (marriage, employment, dependency; death of registrant, reservist, or claimed dependent):

Mother and son came in and stated that they wanted to appeal the board's decision.

The registrant said he was told by his lawyer that he could appeal to the Appeal Board and to the President. I explained to him an appeal and appearance is taken or applied for within 10 days after his notice of classification is mailed, and he was mailed his notice on Jan. 20, 1966.

If he had taken the appeal at that time his file would have been forwarded to the Appeal Board, and if there was a dissenting vote he could then appeal to the President, but that it was too late now.

Then they said that they wanted to appear. I told them the same regulation applied to the appearance as it did to the appeal within ten days after the notice 110 was mailed.

Then they said they wanted to speak to someone higher in authority than the Local Board. They were told to contact the Local Board clerk in the morning to discuss with her any information with regard to his status.

5. Source of information: Registrant and relative.

PAULINE H. MURPHY,
Relief Clerk.

Date: May 11, 1966.

DUVERNAY 3

SOCIAL WELFARE PLANNING COUNCIL,
New Orleans, La., May 12, 1966.

LOCAL DRAFT BOARD No. 42,
701 Loyola Avenue,
New Orleans, La. 70112

DEAR SIR: It has come to our attention that Mr. Raymond DuVernay, 2006 Lapeyrouse Street, is being called for the draft. Mr. DuVernay is employed by this agency as a community worker and in that capacity is working in the Lower Ninth Ward Anti-Poverty Target area.

It is the purpose of this letter to strongly urge that his draft board permit deferment so that he will be able to continue on

the assignment of important community services in that area. The anti-poverty program is being carried out under the National Economic Opportunity legislation and has particular significance in the Lower Ninth Ward, the section of the city so seriously affected by Hurricane Betsy.

The work of Mr. DuVernay is directly related to improving community conditions and his being called to active duty in the armed forces at this time will represent a serious obstacle in this important undertaking.

It is our sincere hope that his draft board will give favorable consideration to this request that a deferment be granted.

Very sincerely yours,

ALBERT G. ROSENBERG,
Associate Executive Director.

DUVERNAY 6

MAY 16, 1966.

Re: DuVernay, Raymond Joseph, SS No. 16-42-46-32.
SOCIAL WELFARE PLANNING COUNCIL,
7th Floor, 211 Camp Street,
New Orleans, La. 70130
(Att: Albert G. Rosenberg Associate Executive Director)

GENTLEMEN. This is to advise that your request dated May 12, 1966 for an occupational deferment on the above named registrant was reviewed and given consideration by the board.

The board wishes to advise that your request has not been granted and registrant is to report for induction as ordered on May 20, 1966.

Very truly yours,

CECILE S. CALMES,
Clerk, Local Board No. 42,
(By Direction of the Board).

DUVERNAY 9

Selective Service System, Minutes of Local Board Meeting

Date of this meeting: May 23, 1966.
Hour this meeting convened: 7:00 p.m.
Date of last meeting: April 27, 1966.
Names of members present: Mr. F. J. Lizana, Acting Chairman; Sidney A. Bozonier, Secy.; Mr. Roy J. Martin.

Minutes of previous meeting read, approved and signed.

The classifications of 200 registrants, listed on the continuation sheet of this form, were determined by a majority vote of the local board.

Other local board minutes:

Board action was taken on the file of Clement C. Andollina, 16–42–40–299 for further consideration of his 3–A classification based on hardship. Current information filed by registrant was reviewed by the board and it was the board's opinion that registrant's hardship still existed and further deferment granted.

Consideration was also given a request submitted by St. Augustine High School in behalf of Paul O. Beaulieu, 16–42–43–238 for further deferment of his 2–S classification, which was granted by the board.

The board declared the following registrants delinquent: James Scott Breath, 16–42–43–257—Arthur Moret 16–42–47–432.

The file of Lawrence DeBarros, 16–42–45–158 was placed before the board for removal of his delinquency.

George Milanez, Jr., 16–42–48–214 and Daniel Edward Willis, 16–42–48–209 were classified 4–F by the board for physical reasons.

Mr. F. J. Lizana who has been serving in the capacity of acting chairman of the board was elected permanent chairman at this meeting.

The members were advised of the selection of Mr. George J. Gasperecy as a member of the board.

Col. Davis visited with the board members. His visits and help is always appreciated.

There being no further business, meeting adjourned.

Hour adjourned: 10:00 p.m.

_____ _____

(Signature of Local Board Member).

COUNSEL'S NOTE: "There follow 9 sheets containing 200 names of registrants whose classifications were considered at said meeting. In each instance the vote was 3–0. DuVernay's name does not appear anywhere in these official Board minutes."

Supreme Court of the United States

OCTOBER TERM 1968

No. 442 Misc.

RAYMOND JOSEPH DUVERNAY, PETITIONER,

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 814 and placed on the summary calendar. The case is set for oral argument immediately following No. 403.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

DECEMBER 9, 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1969

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SUPREME COURT, U. S.

FILED
JAN 21 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 814

RAYMOND JOSEPH DUVERNAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF NATIONAL LAWYERS GUILD

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 814

RAYMOND JOSEPH DU VERNAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

BRIEF AMICUS CURIAE ON BEHALF OF NATIONAL LAWYERS GUILD

INTEREST OF THE AMICUS

The National Lawyers Guild has for several years taken the lead in publishing material dealing with the rights of Selective Service registrants, arranging conferences and workshops for lawyers and lay counselors and in organizing groups of attorneys to represent indigent registrants in every way possible both before and during the institution of judicial proceedings looking to correct allegedly unlawful action by local boards and other Selective Service System entities.

The Guild's experiences have led it, as an organization, to become deeply troubled by the plight of the registrant

who must, usually unaided by counsel, find his way through the procedural labyrinth of Selective Service. The Guild has been troubled, too, that the institutions of Selective Service have not reflected the diversity of views characteristic of society as a whole, a fact documented by several recent studies which are cited in the brief that follows.

STATEMENT OF FACTS

This case is here on certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit, reported at 394 F.2d 969, 1 SSLR 3170 (5th Cir. 1968). It has been set down for argument along with *McKart v. United States*, 395 F.2d 906, 1 SSLR 3123 (6th Cir. 1968), No. 403, which raises one of the same issues, namely, exhaustion of administrative remedies as a prerequisite to judicial review in selective service cases.

DuVernay, a 23-year old Negro, is a registrant of a New Orleans, Louisiana, selective service board. There are 4092 such boards in the United States, each having jurisdiction over a county, a part of a county, or, in the case of an "intercounty local board", a number of counties.[1] The members of these boards, selected by the President upon the nomination of the appropriate Governor or comparable official,[2] are civilians who volunteer their time. They operate under regulations issued by the President and the Director of Selective Service, exempted from the hearing requirements of the Administrative Procedure Act. See § 15, Military Selective Service Act of 1967. Selective Service Law Reporter [hereinafter SSLR], *Practice Manual*, ¶¶ 31-35. In addition, the boards operate under a large body of informal regulatory and quasi-regulatory material issued by the Director of Selective Service and by the Department

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[1] Military Selective Service Act of 1967, § 10(b)(2).

[2] *Id.* This intercession of the governor may make the selection of board members "state action" within the meaning of relevant statutory and constitutional provisions.

of the Army, and sometimes very difficult to obtain in current form.[3] The System's performance is in issue in this case, as will be shown below, because of the "exhaustion of remedies" requirement for which the government successfully contended in the court below, and because of the substantial questions raised concerning the composition of the local board which ordered petitioner to report for induction. More extensive discussion of these issues appears below.

Petitioner's classification history follows a normal pattern: He was classified I-S (H) during the time he was in high school, under the mandatory provisions of § 6(i)(1) of the Universal Military Training and Service Act of 1951, subsequently re-enacted as the Military Selective Service Act of 1967 (Pub. L. 90-40, 81 Stat. 100). During his high school days, he was once mistakenly reclassified I-A, but he told the local board about the error and was placed back in Class I-S(H). He enjoyed a II-S deferment upon his matriculation at Louisiana State University in September 1965. He discontinued his studies at LSU early in 1966 and went to work as a laborer to support his mother and siblings. He was reclassified I-A (available for military service) on January 19, 1966. According to the government's response to the petition for certiorari, DuVernay secured employment "in or shortly prior to March 1966" with an antipoverty agency, the Social Welfare Planning Council. By notice dated April 13, 1966 (SSS Form 252), the local board ordered him to report for induction on May 20, 1966. Following receipt of the Order to Report for Induction, DuVernay, his mother and his employer visited and wrote to the local board to attempt to secure his deferment from service based upon his employment status and upon the hardship which his induction would cause for his mother

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[3]This regulatory material is reprinted in the *Statutes & Regulatory Material* section of the Selective Service Law Reporter, so that the Court may have an idea of its mass.

and siblings. The board consistently refused to cancel the induction order or to grant the deferments requested.

At DuVernay's trial, he attempted to demonstrate that the chairman of the local board was a leader of the United Klans of America and that the local board members had been nominated and selected in a racially-discriminatory manner, in that no Negro had served on the board for at least the past five years.

DuVernay was convicted and sentenced to five years imprisonment, well above the national average sentence; see 1 SSLR 19-20 (1968), and the maximum possible under § 12 of the Military Selective Service Act.

ARGUMENT

I.

DUVERNAY IS NOT FORECLOSED FROM OBTAINING JUDICIAL REVIEW BY VIRTUE OF A FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

A. General

The term "exhaustion of remedies" in the Selective Service law of judicial review has two meanings, only one of which has been considered by this Court. The requirement that generally a registrant must go to the "brink of induction" as a prerequisite to obtaining judicial review of claimed errors in the classification process, considered this Term in *Clark v. Gabriel*, 392 U.S. ___, 1 SSLR 3220 (1968), and resting upon cases dating to *Estep v. United States*, 327 U.S. 114 (1946), and before, is sometimes termed an "exhaustion" requirement, but may more accurately be denominated a question of "ripeness". The rationale of such cases as *Gabriel* and *Estep* is that "litigious interruption" of the selection process is not lightly to be countenanced, and that the registrant must make every effort to spare the courts the burden of reviewing his claim by giving the military every possible chance to reject him.

There is no question of "ripeness" here, for DuVernay went to the brink of induction.

The other question of "exhaustion" may more properly be so denominated. Generally, the courts have required that a registrant take administrative appeals open to him within the Selective Service System before coming to court to challenge the classification he is given.[4] This requirement serves one of the same policy considerations as the "ripeness" rule of *Estep* and *Gabriel,* for it ensures the "many cases that would otherwise be litigated never actually reach the courts." *Lockhart v. United States,* ___ F.2d ___, 1 SSLR 3204 (9th Cir. 1968), set down for rehearing *en banc* Jan. 20, 1968. More than this, however, the exhaustion rule is a rule of deference of "special expertise" and "administrative judgment".[5] The "ripeness" rule does not fulfill this function, for one may go to the brink of induction without exhausting administrative appeals along the way, and one *must* go to the brink of induction even though most administrative procedures which remain to be exhausted after an unsuccessful appeal in the Selective Service System are not relevant to and do not permit one to raise claimed denial of a classification lower than I-A. After an unsuccessful appeal in the Selective Service System, the procedures which remain have rather to do with physical, mental and moral qualifications, and are administered by the Army rather than the Selective Service System. See SSLR, *Practice Manual,* ¶¶ 1108-19, Army Regulation 601-270 (Induction Center Processing) (reprinted at SSLR 2227 *et seq.*).

With this short discussion as a preface, we turn to a discussion of the "exhaustion of remedies" requirement.

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[4] The case law is summarized in *United States v. McKart,* 395 F.2d 906, 1 SSLR 3170 (6th Cir. 1968).

[5] *Wills v. United States,* 384 F.2d 943 (9th Cir. 1967), *cert. denied,* 391 U.S. ___ (1968).

The exhaustion requirement has been applied with almost unvarying harshness by the district courts and courts of appeals until rather recently.[6] However, in *Donato v. United States*, 302 F.2d 468 (9th Cir. 1962), the court held out a "particular circumstances" test for relaxation of the rule. In *Wolff v. Selective Service Bd.*, 372 F.2d 817 (2d Cir. 1967), the court held that the registrants need not have exhausted remedies where to do so would have been futile. In *Wills v. United States*, 384 F.2d 943 (9th Cir. 1967), *cert. denied*, 391 U.S. ___ (1968), the court held that the registrant was excused from the requirement that he exhaust administrative remedies because: first, his punitive reclassification raised a constitutional issue upon which "courts have little reason to defer to administrative determination"; and, second, the board had misled the registrant concerning his selective service status, and the misleading could have contributed to his decision not to appeal. *Wills* was followed in *United States v. Carson*, 282 F.Supp. 261, 1 SSLR 3046 (E.D. Ark. 1968), the court holding that a registrant was excused from taking an appeal in a case involving a local board error of constitutional magnitude.

And, in *Lockhart v. United States*, ___ F.2d ___, 1 SSLR 3204 (9th Cir. 1968), cited *supra*, the court held that a conscientious objector applicant was excused from the exhaustion requirement:

> "There is nothing in the Selective Service laws or regulations that precludes a defendant indicted for a criminal violation of the Selective Service law from attacking the jurisdiction of the Draft Board unless he has first exhausted all administrative remedies. The rule of exhaustion is a court-made rule.
>
> "We think that this is an appropriate case for relaxing the rule.
>
> "To hold otherwise would be to deny to this defendant, indicted for a criminal offense, the

---

[6] See *McKart, supra* note 4.

> opportunity to offer proof of the only defense that he has on the flimsy excuse that he did not take certain procedural steps in a complex administrative proceeding, in the face of uncontradicted evidence that he did not understand what an "appeal" was, and that he was not told and did not know the consequences of his failure to seek administrative review. After all, the Supreme Court no longer adheres to the proposition that everyone is presumed to know the law. See *Lambert v. California*, 355 U.S. 225 (1957). To hold otherwise would be wholly inconsistent with decisions of our Supreme Court which have gone so far in recent years to bring more equal justice to the young, the poor, the uneducated, and the uncounseled."

So, it may fairly be said, the Court confronts the exhaustion requirement in the face of recognition by lower courts of at least three exceptions: futility, constitutional law and ignorance. These exceptions are analogous to well-established rules in other areas of the law of judicial review. The example which most immediately comes to mind is that of federal *habeas corpus* for state prisoners. This Court's development of exhaustion rules designed to do deference to state courts while protecting the federal rights of state criminal defendants has been the subject of more legal writing than almost any other single subject of this Court's attention. And *Fay v. Noia*, 372 U.S. 391 (1963), and *Townsend v. Sain*, 372 U.S. 293 (1963), this Court's most recent major expressions of view, have been celebrated and damned with equal vigor. But *Fay* expresses a view of waiver and exhaustion which is appropriate here, for it places stringent limits upon the rule, which reached its zenith in *Darr v. Burford*, 339 U.S. 200 (1950), that unless a state prisoner (often unaided by counsel) exhausted *all* his remedies in a timely manner he might forever be barred from federal *habeas corpus*. *Fay* overturned *Darr* and held that a state prisoner would not be foreclosed, on "exhaustion of remedies" grounds, from federal *habeas* except upon the basis of a "knowing" waiver of his state remedy:

> "If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate bypassing of state procedures, then it is open to the federal court . . . to deny him all relief. . . . At any event we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner." 372 U.S. at 439.

The "deliberate bypass" rule was elaborated upon in *Henry v. Mississippi*, 379 U.S. 443 (1965), in which the Court remanded a state criminal conviction for a determination whether there had been a "deliberate bypass" of the state's contemporaneous objection rule, thus foreclosing federal review of Henry's contention that his conviction had been obtained with the use of "tainted" evidence.

It need not, of course, be said that *Fay* and *Henry* reflect a return to the waiver rule of *Johnson v. Zerbst*, 304 U.S. 458 (1938), and are part of a consistent pattern of recent decisions which make a clear finding of intentional relinquishment prerequisite to a holding that a litigant has waived a federal right. See, *e.g.*, *Brookhart v. Janis*, 384 U.S. 1 (1966) and *Miranda v. Arizona*, 384 U.S. 436 (1966). See also Comment, 54 Calif. L. Rev. 1262 (1966), for a valuable discussion of the issues. These cases appear to rest upon a frank recognition that most defendants in criminal cases (even granting that after *Gideon*[7] most litigants will have counsel to help them) are unaware of the technical details of substantive and procedural law which rule their cases. Does this rationale apply to the case before the Court? An analysis of the Selective Service System suggests that it does.

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[7] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

B. The Selective Service System: An Administrative Obstacle Course[8]

The System, governed by a vast quantity of formal and informal regulatory material, see Right of Counsel in the Selective Service System, Hearing Before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, May 16, 1968 [hereinafter *Hearings*], at 33 (statement of Sen. Kennedy), 94-99 (statement of Michael E. Tigar), affects millions of young men. Yet, its operation is a mystery to most registrants,[9] to many clerical employees,[10] and even to the very people who are designated to advise registrants as to their rights—the volunteer government appeal agents.[11] Desultory attempts have been made to remedy this situation: General Hershey started a series of informative memoranda to government appeal agents but has apparently given up after sending four extremely sketchy mimeographed discussions of a few marginal points. Selective Service System, Memoranda to all Government Appeal Agents (1967-68). As late as July 24, 1967, General Hershey confessed in a letter to local baords that "in many instances" the little four page folder "Selective Service and You" (outlining the System's procedures extremely sketchily—reprinted at *Hearings*, pp. 44-47) was not being given out to registrants as it should be. Operations Bulletin No. 308 (reprinted at SSLR 2200:58). At the very time of DuVernay's contact with the System, the

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[8] This title is drawn from a Comment by Charles Wilson, based upon field research into the operations of the Selective Service System and published at 54 Calif. L. Rev. 2123 (1966).

[9] *See, e.g., Petersen v. Clark,* 1 SSLR 3241 (N.D. Calif. 1968).

[10] *See, e.g., Striker v. Resor,* 1 SSLR 3019 (D.N.J. 1968) (board clerk misadvice to registrant).

[11] National Advisory Comm'n on Selective Service, In Pursuit of Equity: Who Serves When Not All Serve? 28-29 (1967), documenting the lack of knowledge on the part of appeal agents of the law of selective service. *See also Hearings, passim.*

Marshall Commission was documenting a searing indictment of the System's failure to inform registrants of their rights.[12]

Perhaps this apparent lack of concern is understandable, for General Hershey is fond of saying that registrants have no rights except the right to do military service—all else is legislative or administrative grace. Hershey, *The Selective Service System,* Current History, July-August, 1968, p. 3. That this view does not fit well with current constitutional theory[13] does not appear to perturb the Director or his local boards. A detailed statistical study has shown that board members attitudes are not those which one has a right to expect of adjudicative officials in the federal system. See, generally, Davis & Dolbeare, *Little Groups of Neighbors* (1968).[14]

How are we to govern such a system, so that it is in the words of § 1 of the Military Selective Service Act, "fair and just"? Some had thought that preinduction judicial review would do the job. But compare *Clark v. Gabriel,* 392 U.S. ___, 1 SSLR 3220 (1968) with *Oestereich v. Selective Service System,* 392 U.S. ___, 1 SSLR 3215 (1968). Some had for a moment hoped that fair administrative procedures—the "judicialization" of the System, would come about in the 90th Congress. *But see* 1 SSLR 3, 12 (1968). After the Marshall Commission reported,[15] some had pointed out that the President could with a stroke of the pen require every registrant to be given a booklet like that sent every taxpayer

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[12]Nat'l Advisory Comm'n on Selective Service, *supra.*

[13]For a general survey; *see* Linde, *Justice Douglas on Freedom in the Welfare State: Constitutional Rights in the Public Sector,* 39 Wash. L. Rev. 4 (1964).

[14]The authors of this book were consultants to the National Advisory Comm'n on Selective Service, and their work is the most exhaustive study to date of local board conduct, attitudes, and prejudices.

[15]Note 11, *supra.*

every year with his Form 1040. But nothing happened, even though such regulations can be made merely by publishing them in the *Federal Register*.

Now, to cap this System with a rule which treats the Selective Service appeals process not as a means to correct errors but as set with springes for the registrant when he finally does seek judicial review is unwise and unfair. The way must be open for thrusting back onto the System the responsibility for informing registrants, by permitting judicial review even where the registrant has not exhausted his remedies, unless it is shown he deliberately bypassed them.

The government has, it is true, argued that the notice of right to appeal on the back of each notice of classification is enough notice to call for a "deliberate bypass" conclusion in every case. It is respectfully suggested that few state courts would hold a restaurant patron or parking lot customer to such a stringent standard of taking notice when the issue is the loss of a checked garment or a bent fender. See *Klar v. H. & M. Parcel Room*, 296 N.Y. 1044, 73 N.E. 2d 912 (1947). It seems, therefore, peculiarly inappropriate for the government to insist upon this rule under these circumstances.

When this cursory notification is contrasted with the detailed and insistent demands which the Internal Revenue Service makes on the delinquent taxpayer,[16] the government's contention seems little short of preposterous.

Similarly, one may argue recognized that exhaustion of remedies should not be required when to do so would be futile.

The "constitutional issue" exception and the "error of law" exception posed in *McKart* and the cases upon which McKart's claim rested in the court of appeals raise more difficult problems. (However, for *McKart*, it is clear that the

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[16] See Surrey & Warren, Federal Income Taxation 54-70 (1960 ed.) (note on income tax procedure).

statutory exemption to which he was entitled, that of a sole surviving son, provides that he "shall not be inducted". § 6(o), Military Selective Service Act of 1967. Hence, the rule of *Oestereich v. Selective Service System*, 392 U.S. ___, 1 SSLR 3215 (1968), would entitle him to raise his claim despite his having failed to follow administrative procedures established by regulation.) Constitutional claims and claims resting upon the failure of the System to follow its own procedural and substantive rules ought to be reviewed, it seems, even though the registrant has not exhausted his remedies. Of course, the failure of the System to follow statutory provisions or its own administrative regulations raises constitutional question. *Service v. Dulles*, 354 U.S. 363 (1957); *Vitarelli v. Seaton*, 359 U.S. 535 (1959). The justification for thus relaxing the rule is found in *Wills v. United States*, 384 F.2d ___ (9th Cir. 1967), *cert. denied*, 391 U.S. ___ (1968).

C. Conclusion

For the reasons set forth above, it appears that DuVernay should not be foreclosed from judicial review by virtue of his failure to take an administrative appeal.

II.

THE APPLICATION OF THE PRECLUSION PROVISIONS OF 32 C.F.R. 1625.2.

32 C.F.R. § 1625.2 provides that a board may not reopen the classification of a registrant after issuance of an order to report for induction unless it first specifically finds that there has been a change in status resulting from circumstances beyond the registrant's control.

While it is true that this provision has been held valid as a means of precluding late-raised claims, *e.g.*, *United States v. Gearey*, 368 F.2d 144 (2d Cir. 1966), these decisions are by no means conclusive upon the issue before the court.

First, there remains an issue whether 1625.2 means, as the government has asserted, that *any* claim raised after

issuance of an order to report for induction is barred unless the registrant recites—and the board finds—that some tangible change has occurred, in his condition of health or pattern of life, which resulted from no act of volition upon his part. A broken leg, a pregnant wife (See *Talcott v. Reed*, 217 F.2d 360 (9th Cir. 1954)), and a sudden promotion into a new and more important job potentially deferable under 32 C.F.R. §§ 1622.22-22.23, are perhaps examples of what the government has in mind.

But why read the regulation thus narrowly? Consistent with the argument raised in Part I, it is wise to read the inartful words of § 1625.2 as meaning that the registrant is foreclosed from raising his claim if, and only if, his failure to raise it prior to issuance of the Order to Report for Induction resulted from a deliberate bypass of the orderly preinduction procedures for raising claims. As may be seen from the analysis above, no such conclusion can be reached in the general run of Selective Service cases, at least until the System takes seriously its public information responsibilities. See *Petersen v. Clark*, 1 SSLR 3241 (N.D. Calif. 1968) (holding that where a registrant's late filing of a CO application was caused by failure to understand the law of conscientious objection).

Indeed, there is some question whether § 1625.2 will withstand constitutional scrutiny if construed any more broadly than as a "deliberate bypass" proviso. See Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest*, 54 Calif. L. Rev. 1262 (1966). The discussion of "competence" and "personal participation" appears above in Part I of this brief. On the score of "legitimate interest", it is useful to note that § 1625.2 was originally issued in December of 1941, after the nation had been plunged into war by the events at Pearl Harbor. The new provision read that reopening could not be granted after issuance of an order to report for armed forces physical except on a showing of change in status beyond the reigstrant's control. In 1942, the regula-

tion was amended to its present form, making the cutoff date the issuance of an order to report for induction. Selective Service System, *Selective Service Regulations*, 301 (3d ed., 1st printing 1944). Thus, the "interest" served was an absolutely critical national need for total and rapid mobilization. Now, 27 years later, the justification for a rigorous insistence upon a registrant, at his peril, knowing all the regulations and procedures and using them to gain deferment before an induction order is issued, is rather more attenuated.

III.

REOPENING OF A REGISTRANT'S CLASSIFICATION

The concept of "reopening" is essential to the understanding of this case. When the appellate process is terminated, or at any time when there come into light facts which might justify a change in the registrant's classification, the local board may be prevailed upon to reopen the registrant's classification and classify him anew. If new facts come to the board's attention, it may of its own motion reclassify the registrant. The discussion which follows sets out the reopening procedure provided in the regulations. 32 C.F.R. Part 1625.

Reopening is accomplished by any of three means: First, if the registrant, a person claiming to be a dependent, a person who has on file a request for occupational deferment of the registrant, or a government appeal agent should file a request in writing setting out facts which, if true, would justify reclassification, or if the board of its own motion decides that such facts exist, then the board *may* reopen. In either event, the board may not reopen after mailing an order to report for induction or for civilian work unless it finds that there has been a change in the registrant's status resulting from facts over which he had no control. 32 C.F.R. § 1625.2. Second, if the State Director or National Director requests reopening, the board *must* reopen. 32 C.F.R. § 1625.3(a). Finally, if the board receives facts that

one ordered to report for induction is entitled to a I-S(C) classification, it must cancel the order and place him in that classification. 32 C.F.R. § 1625.3(b). A reopening by a local board cancels any outstanding order to report for induction or for civilian work except that if the registrant has failed to comply with either of these orders, reopening for the purpose of placing him in Class V-A (over age) or IV-C (alien) will not cancel the order with which he failed to comply. 32 C.F.R. § 1625.14. Of course, the order may be of no effect in any case because based upon an improper classification into I-A or other deficiency.

Crucial to the concept of "reopening" is "classification anew". When the board reopens a registrant's classification and reconsiders his case, it is considered to have classified anew, and all the procedural consequences which attach to an initial classification attach well to such an action. The registrant has the same rights of personal appearance and appeal that he had at the time the board first classified him. 32 C.F.R. §§ 1625.11-25.13. The board must mail a new notice of classification to the registrant, and new advices of classification to all those having on file current requests for his deferment, as soon as practicable after reopening the registrant's classification. 32 C.F.R. § 1625.12.

If reopening is not mandatory, the board may, under 32 C.F.R. § 1625.4, decline reopening and send out a letter to the person requesting the reopening noting its action. No other information need be sent out under the regulations, and the registrant himself may not be aware of the board action if the reopening was requested by someone other than himself—his employer or a dependent, for example.

The board's discretion is absolute under the regulations.[17] Ostensibly, it may reconsider the registrant's entire file and not give him a personal appearance or appeal from its action by the simple expedient of not reopening, whereas if it were to reopen, the registrant would have a personal

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[17] See 32 C.F.R. § 1625.4.

appearance and an appeal even if the board retained him in the same class.[18] The possibilities for abuse of such a system have led to judicial checks upon it.

If a registrant sends to his board information in support of reopening which makes out a *prima facie* case for placement in the classification he claims, the board has been held to be required to reopen.[19] If the registrant seeking reopening is in class I-A, failure to grant reopening and all its attendant procedural rights of personal appearance and appeal invalidates the board's order to report for induction.[20] As an alternative basis for judicial review of board action, courts have held that if the board receives the registrant's proffered claim and actually inquires into the merits

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[18] 32 C.F.R. § 1625.11.

[19] Miller v. United States, 1 SSLR 3014, 388 F.2d 973 (9th Cir. 1967) (Form 150 presented facts which, if true, would justify a change in the registrant's classification, hence board erred in not reopening; conviction based on continuance in I-A status reversed); Stain v. United States, 235 F.2d 339, 342 (9th Cir. 1956) (semble); United States v. Freeman, 1 SSLR 3012, 388 F.2d 246 (7th Cir. 1967) (semble; court underscores denial of reopening is also denial of right to appeal denial of claim for classification); United States v. Majher, 250 F. Supp. 106 (S.D.W.Va. 1966) (board must have basis in fact to deny reopening); United States v. Burlich, 257 F. Supp. 906 (S.D.N.Y. 1966) (semble); United States v. Ransom, 223 F.2d 15 (7th Cir. 1955) (prima facie case for IV-D classification requires reopening; failure to reopen voids induction order); Olvera v. United States, 223 F.2d 880 (5th Cir. 1955) (semble); Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1956) (prima facie case for III-A requires reopening; injunction issued). But note that the request for reopening must be made as such, *e.g.*, United States v. Monroe, 150 F. Supp. 185 (S.D. Calif. 1957), although there is strong authority that a mere letter stating that one has grounds for exemption must be treated as a request for reopening. United States v. Stafford, 1 SSLR 3040, 389 F.2d 215 (2d Cir. 1968).

[20] The authorities cited, Note 19 *supra*, stand for this proposition. An induction order becomes void after issuance if the board "loses jurisdiction" through arbitrary failure to reopen.

of his classification, it cannot shut off review of its action by refusal to reopen.[21] Reopening will be "deemed" to have occurred,[22] and the board's failure to provide notice of personal appearance and appeal rights following its action will, if the registrant is in Class I-A at the time of the refusal, invalidate a subsequent order to report for induction.[23] See 32 C.F.R. § 1625.3(a).

The board must, under the prevailing view, reopen when facts are presented to it making out a *prima facie* case for reclassification. This Court has never held that there are limits upon the discretion of a board to deny reopening, but the consistent course of decision by the courts of

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[21] This approach is suggested in Miller v. United States, *supra*, note 19, at 976-77. There the court held that the board had actually reached and considered the merits of the registrant's I-O claim, and that it could not so do unless it formally reopened his classification with all the attendant rights of personal appearance and appeal. The court held that inquiry into the merits of a classification without formal reopening denied the registrant due process, not only in that a fair hearing was not granted, but in that the board was in effect discriminating between those registrants whose claims it reopened and those whose claims it considered on the merits without reopening. In United States v. Vincelli, 216 F.2d 681 (2d Cir. 1954), the court found that the board had actually inquired into the merits of the registrant's IV-D claim and thus had in fact reopened his classification even though its action was noted in the board minutes as a denial of reopening. Having found a de facto reopening, the court held the board erred in not sending the registrant a new notice of classification informing him of his right to appeal. Reopening was "deemed to have occurred" in United States v. Baker, 1 SSLR 3017 (E.D.N.Y. 1968), because the board did in fact inquire into the merits of the registrant's claim; thus the board error was in not cancelling the outstanding order to report for induction as required by § 1625.14 and not giving the registrant the rights of personal appearance and appeal as required by 32 C.F.R. § 1625.11.

[22] United States v. Baker, *supra* note 21.

[23] *See* cases cited *supra* note 21.

appeals which have considered the matter is not lightly to be ignored. It is important to recall in this connection that the board is not free to deny requests for reclassification because it believes that it has a basis in fact for doing so. The "basis in fact" standard is a criterion governing judicial review, not the standard to be applied by the board in judging applications for reopening. See *Woodby v. I&NS*, 385 U.S. 276 (1966). The board *must*, under one view, reopen unless the application for deferment or exemption is "frivolous", see *Miller v. United States*, 388 F.2d, at 976, or if he makes out a "prima facie case", *United States v. Freeman*, 388 F.2d 246, 1 SSLR 3012 (7th Cir. 1967). In a case involving a dependency deferment, such as DuVernay's the board's reopening gives the registrant an opportunity to appear and discuss his family situation in accordance with the standards for dependency. See SSLR, *Practice Manual*, ¶ 1061. And an occupational deferment claim is aided by reopening since not only the local board, but an Advisory Committee created by the State Director of Selective Service, can consider whether the registrant's occupation is necessary to the national health, safety and interest, or whether he fulfills some community need. See 1 SSLR 25; SSLR, *Practice Manual*, ¶ 1054; 32 C.F.R. §§ 1622.22-22.23; Local Board Memorandum 95.

IV.

THE RACIAL COMPOSITION OF LOCAL BOARDS.

"Reorganized in 1915, this Ku Klux Klan was flourishing again by 1919. Its program 'for uniting native-born white Christians for concerted action in the preservation of American institutions and the supremacy of the white race', was implemented by flogging, branding with acid, tarring and feathering, hanging and burning." Report of the National Advisory Commission on Civil Disorders, p. 219.

As the record in this case indicates, petitioner's trial counsel sought to question a government witness as to

whether the chairman of the local board at the time of the events in question was an official of the United Klans of America. And an attack was also made upon the local board's actions based upon the uncontested fact that for the past five years no Negro has sat upon the petitioner's board.

As the Court is aware, the system of selection which the Congress has mandated is to be "fair and just", and the selective service regulations contain an explicit "nondiscrimination" provision. And while the System's officials have protested that draft board proceedings are not "a lawsuit", see *Hearings* at 31, they are clearly adjudicative in the accepted sense of the term.

Therefore, it seems passing strange to say, as the Fifth Circuit has done, *e.g.*, *Clay v. United States*, 1 SSLR 3088 (5th Cir. 1968), *cert. pending*, that local boards invalidly constituted in the sense of being selected in a racially discriminatory way are like malapportioned legislatures, and their decisions are valid though their composition may be challenged (if § 10(b)(3) of the Military Selective Service Act is not at bar, see *Boyd v. Clark*, ___ U.S. ___, 1 SSLR 3287 (1969)) by a civil suit.

Racially discriminatory selection policies produce a board which appears to registrants to represent, and, bearing in mind one rationale of the jury selection cases, has a high probability of reflecting, the prejudices and hostilities which the dominant white community in the South bears toward the black community. This point is underlined in this case by the exclusion of evidence concerning Klan activity by the board chairman. Just this term, this Court insisted that arbitrators under the Federal Arbitration Act must be as free as judges from implied bias. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, U.S. , 37 U.S.L.W. 4037 (1968). Ought the same principle to apply to local boards? The amicus suggests that it should.

CONCLUSION

For the foregoing reasons, the amicus respectfully suggests that the conviction in this case should be reversed.

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OCTOBER TERM, 1968

No. 814

RAYMOND DUVERNAY,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 814

RAYMOND DUVERNAY,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

Petitioner was tried before a jury in the United States District Court for the Eastern District of Louisiana and convicted on August 30, 1966. The Fifth Circuit Court of Appeals affirmed that decision in an opinion filed on February 7, 1968, and reported at 394 F.2d 979 (1968). A petition for rehearing *en banc* was denied on May 14, 1968.

Jurisdiction

This Court was petitioned to accept jurisdiction under 28 U.S.C. § 1254 on June 24, 1968. That petition for a Writ of Certiorari was granted December 9, 1968. The motion for leave to proceed *in forma pauperis* was granted on the same day.

Constitutional and Statutory Provisions Involved

The principal constitutional and statutory provisions involved are the Fifth, Thirteenth and Fourteenth Amendments to the Constitution and 50 U.S.C. § 462, 32 CFR 1625.1, 32 CFR 1625.2, 32 CFR 1625.11, 32 CFR 1625.13 and 32 CFR 1625.14. Due to their length, the statutory provisions are reproduced and appended hereto.

Questions Presented

1. Can a criminal defendant on trial for refusal of induction be denied the right to raise constitutional defenses where the board below had no jurisdiction of such questions and civil actions in advance of induction are prohibited?

2. Can constitutional defenses be waived on a criminal trial by failure to raise them before Selective Service boards below?

3. Can a Selective Service Board reconsider a classification upon a prima facie showing of facts justifying an exemption and refuse the registrant an appeal?

4. Can a Selective Service Board properly and effectively delegate its responsibility and authority to classify and to consider applications for exemptions to the clerk?

5. Is systematic exclusion of black people from service on local board No. 42 a violation of this black petitioner's right under the Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution?

6. Is an induction order valid and binding when it has been issued by a Selective Service Board from which black persons have been systematically excluded?

Statement of the Case

Petitioner is a young Negro man, now twenty-three years of age who, upon reaching his eighteenth birthday, registered as required with the Selective Service System. He received a I-SH deferment due to his status as a high-school student (R. 28). Upon his subsequent enrollment in college, he was given a II-S classification (R. 28). In early 1966, petitioner left college. Upon learning that petitioner was no longer in school, the Local Draft Board reclassified him I-A on January 19, 1966.

Petitioner subsequently was employed by the Social Welfare Planning Council where his duties consisted of doing social work among the poor in his home town, New Orleans, Louisiana (R. 29). It appears that he began that employment sometime in March, 1966 (R. 38). His family being in need of the financial assistance he could then provide (R. 39), petitioner began regularly to lend substantial financial support to his mother and six brothers and sisters (R. 39). On April 13, 1966, petitioner's Local Board sent him a notice to report for induction on May 20, 1966 (R. 15).

After receiving the April 13 notice, petitioner made numerous attempts to obtain deferments to which he believed himself entitled, alone and with his mother, petitioner appeared at the Local Board and presented to the Clerk evidence which should have entitled him to a hardship or dependency deferment (R. 17, 32, 39-41). On May 12, 1966,

one of petitioner's supervisors, the Associate Executive Director of the Social Welfare Planning Council, wrote a letter to the Local Board on petitioner's behalf (R. 18). Another supervisor thereafter appeared at the Local Board to further assist petitioner in presenting information entitling him to an occupational deferment (R. 33, 37-38).

The record contains much evidence establishing the fact that the Local Board was giving some attention to petitioner's request for deferment. One board member, Mr. Bozonier, testified that at one board meeting, which appears to have been on April 27, 1966, two hundred and thirty-four registrants were classified or reclassified. It was presumably at that meeting that petitioner's claim for dependency and hardship deferment was reviewed because on April 28, 1966, the Local Board by letter informed petitioner that his claim had been "given careful consideration" (R. 85). No change in his status was then made and he was not informed of any procedures available to him to further press that claim before the Board or to appeal the Board's "consideration".

Testimony at trial revealed that the letter of petitioner's supervisor, written on May 12, 1966, was also "discussed at one of the meetings" of the Board (R. 52). Thus, on a second occasion subsequent to the issuance of petitioner's induction notice but prior to its effective date, the Local Board discussed petitioner's status. And again, on this second occasion, petitioner was given no information regarding means available for pressing his claim for occupational deferment before the Board or for appealing the Board's conclusion.

Testimony and proffered proof at trial established that no Negroes have served on petitioner's Draft Board in the

past five years. Petitioner further offered to prove that no Negro has ever served on petitioner's Draft Board. The Chairman of petitioner's Board, however, was a known member of the Ku Klux Klan as would have further been conclusively established had evidence relevant thereto been permitted at trial.

On May 20, 1966, petitioner reported to the induction center pursuant to the Board's order. He completed the entire procedure there with the exception of refusing to step forward to be inducted.

An indictment was filed on June 6, 1966, charging petitioner with violation of 50 U.S.C. 462. A trial by jury was held, and a verdict of guilty was returned on August 30, 1966. The conviction was affirmed in the Court of Appeals on February 7, 1968. It is from that judgment petitioner appeals.

Summary of Argument

This term of Court, the Court has ruled that preinduction judicial review of Selective Service cases is not available in the vast majority of circumstances. *Oestereich* v. *Selective Service System,* No. 46 (October Term 1968, 1 S.S.L.R. 3215) and *Clark* v. *Gabriel,* No. 572 (October Term 1968, 1 S.S.L.R. 3220). The registrant has, except in exceptional circumstances, been relegated to raising his objections to his classification or otherwise testing his status, by way of defense to a criminal proceeding. Mr. Justice Harlan, concurring in *Oestereich* v. *Selective Service System, supra,* has elucidated further the court's ruling, stating that one reason underlying it is the fundamental incompetence of the administrative agency to effectively handle questions of constitutional law. 1 S.S.L.R. at 3217. This being the case,

petitioner appeared before a judicial forum to present, by way of criminal defense, his constitutional argument and objections to his classification and he was met by an absolute "bar" to the court's entertaining those issues on the ground that he should have raised them before the administrative agency. *DuVernay* v. *United States,* 394 F.2d 979. Thus, the sum total of the situation—combining this court's ruling in *Oestereich* and *Gabriel* with the Fifth Circuit Court of Appeals' ruling in *DuVernay* is that " . . . petitioner [will be deprived] . . . of his liberty without the prior opportunity to present to any competent forum—agency or court—his substantial claim that he was ordered inducted . . . " unlawfully, 1 S.S.L.R. at 3217, Mr. Justice Harlan, concurring.

The ruling of the Fifth Circuit Court of Appeals requiring petitioner to present to his inaccessible all-white Local Draft Board constitutional arguments relating to the total lack of procedural due process in his processing and the systematic exclusion of Negroes from his Draft Board defies both law and logic. As suggested by Mr. Justice Harlan in *Oestereich,* the Board is not competent to hear such arguments, nor indeed is the petitioner or any other young registrant, unaided by counsel and ignorant of his rights, competent to present such arguments.

Petitioner herein made available to his Board all the evidence necessary or that he believed necessary, to substantiate his claims for deferment. There was nothing more in that respect that he was able to do; or if there was an avenue for appeal, it was never made known to petitioner.

Pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and pursuant to 32 C.F.R. § 1622.1 (b) and (d) petitioner has the right to fair and non-

discriminating treatment before his local draft board. For the past five years, although there are many members of the black community who are qualified to serve, no black person has been appointed to petitioner's local board. Systematic exclusion of blacks is a denial of petitioner's constitutional right against the potential threat of racial discrimination and his statutory guarantee that he will receive fair and unbiased treatment. In addition, 50 U.S.C. App. § 460(b)(3) recognizes a right of citizen participation in the operation and administration of local draft boards. Under the Fifth and Fourteenth Amendments to the United States Constitution black people are entitled to the enjoyment of the same federal rights and privileges enjoyed by whites. Moreover, the denial of the opportunity to participate in the operation and administration of local draft boards is a violation of the Thirteenth Amendment to the United States Constitution, in that the inability to so participate constitutes a badge and indicia of slavery. *Scott* v. *Sandford*, 19 How. 393, 60 S.Ct. 691 (1857).

An induction order issued by a board from which blacks have been systematically excluded is void as matter of law. The order is a direct violation of petitioner's guarantee against discriminatory treatment and his right to be free of all badges and indicia of slavery. "The evil of racial exclusion cannot be ignored . . . " and this Court is obligated to "fashion judicial remedies to the realities to assure actual enjoyment of the constitutional ideals". *Brooks* v. *Beto*, 366 F.2d 1, 24-25 (5th Cir. 1966). The lesson we have learned from a history of jury cases before this Court is that the only realistic way to protect against the evils of systematic exclusion is to invalidate the orders issued by the body from which blacks have been systematically excluded.

ARGUMENT

I.

If Petitioner Is Foreclosed From Presenting His Constitutional Arguments by Way of Criminal Defense to Prosecution for Refusal to Submit to Induction, He Will Be Denied the Right to Ever, in Any Competent Forum, Present Those Claims for Consideration.

In *Oestereich* v. *Selective Service System,* No. 46 (October Term, 1968) and in *Clark* v. *Gabriel,* No. 572 (October Term, 1968) this Court held that, apart from exceptional circumstances not here applicable, registrants with the Selective Service System may raise objections to their classifications, including constitutional objections only by way of defense to a criminal prosecution or by *habeas corpus* to obtain release from service. At least one mainstay of this ruling lies in the opinion of Mr. Justice Harlan, concurring in *Oestereich.*

> "Second, a challenge to the validity of the administrative procedure itself not only renders irrelevant the presumption of regularity, but presents an issue beyond the competence of the Selective Service boards to hear and determine. Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies. * * * Such authority cannot readily be inferred, for the composition of the boards, and their administrative procedures, render them wholly unsuitable forums for the adjudication of these matters. . . ." 1 S.S.L.R. at 3217.

Selective Service registrants are thus relegated to the judicial rather than the administrative forum and told to raise their judicial arguments in defense to the criminal prosecution. Petitioner has done precisely that which this Court ordered be done in *Clark* v. *Gabriel, supra.*

Upon taking his constitutional arguments to the Federal Court, however, petitioner was met with the ruling that he should have presented his constitutional claims to the Local Draft Board and his failure to do so foreclosed judicial consideration of those claims. This ruling flies in the face of Justice Harlan's opinion in *Oestereich, supra,* and is contrary to the most fundamental and historic precedents of law in this area. *Parrott* v. *United States,* 370 F.2d 388 (1966), cert. den. 387 U.S. 908 and *Wills* v. *United States,* 384 F.2d 943 (C.A. 9, 1967), cert. den. 36 L.W. 3473 (1967), and *Hart* v. *United States,* 382 F.2d 1020 (C.A. 3, 1967), cert. den. 1 S.S.L.R. 3087, 3088, Justice Douglas, dissenting.

Yet even more serious than the basic error of the assertion that constitutional agreements should be presented for administrative decision is the result which inevitably flows from the conclusion of the Fifth Circuit Court of Appeals' decision: If the administrative agency is incompetent to consider constitutional issues and the court refuses to hear those issues unless they are first presented to the Board, petitioner will be denied all review of his constitutional claims and "... depriv[ed] of his liberty without the prior opportunity to present to any competent forum—agency or court—his substantial claim that he was ordered inducted pursuant to an unlawful procedure." 1 S.S.L.R. at 3217.

II.

Exhaustion of Administrative Remedies Is a Wholly Inappropriate Doctrine to Apply Where Questions of Constitutional Law Are at Issue.

The Court below does not really base its exhaustion of administrative remedies decision on any supposed failure of petitioner to present facts relevant to his classification to the Local Board. Although the opinion details the procedures for presentation of facts to the Board and appeal of Board determinations, the Court ruled that the defenses of due process of law and exclusion of Negroes from the Selective Service machinery were waived by petitioner's failure to present those purely legal, constitutional issues to his Local Board. Such a ruling is totally without support in law or logic.

It has long been established that adjudication of constitutional matters is beyond the competence of administrative agencies. *Staub* v. *Baxley,* 355 U.S. 313 (1958); *Thomas* v. *Collins,* 323 U.S. 561 (1945); *Public Utilities Commission* v. *United States;* 355 U.S. 534 (1958).

As Mr. Justice Harlan concurring in *Oestereich* v. *Selective Service System,* 155 L.R. 3215, 3217 stated:

> ". . . a challenge to the validity of the administrative procedure itself . . . presents an issue beyond the competence of the Selective Service boards to hear and determine. . . .
>
> . . . their administrative procedures render them wholly unsuitable forums for the adjudication of these matters . . ."[1]

[1] Indeed it is difficult to imagine the means available to petitioner for raising his constitutional challenges to the Board. It need not

See also *Wills* v. *United States,* 384 F.2d 943, 945 (1967), cert. den. 36 L.W. 3473 (1967) ("[An] objection founded upon a claim of constitutional right, was one which courts have little reason to defer to the administrative determination."), and *Hart* v. *United States,* 382 F.2d 1020 (1967), cert. den. 1 S.S.L.R. 3087-3088. Mr. Justice Douglas dissenting (". . . whatever effect the exhaustion of administrative remedies doctrine may have on the classification issues, it is wholly inapplicable to the constitutional question.") *United States* v. *Carson,* 282 F.Supp. 261, 271 (E.D. Ark., 1968) ("The experience of the administrative boards and agencies will generally render them better equipped than the courts to solve factual problems, within their respective fields, but, as stated in *Wills, supra,* where the dispute is a question of law, 'the exhaustion rule loses much of its force' . . ."), *Unglesby* v. *Zimny,* 250 F.S. pp. 714, 717 (1965); *Lee County School District No. 1* v. *Gardner,* 263 F.Supp. 26, 31 (1967); Jaffe, *The Exhaustion of Administrative Remedies,* 12 Buffalo L.Rev. 327.

As Justice Harlan further points out, not only are the Boards incompetent to hear constitutional issues but registrants are incompetent to raise them—and their failure to raise them cannot be held to be a "waiver" of those issues. In *Oestereich,* Justice Harlan stated:

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be agreed that one cannot expect a twenty-year old Negro youth to complain to his segregated draft board, particularly given its alleged Ku Klux Klan taint, that Negroes are excluded from the Board. And there is little more sense to suggesting that this youth, unfamiliar with the procedures of the Board and his rights relating thereto and unaided by counsel, should file some sort of paper with his Board complaining of the denial there accomplished of his right to due process of the law. In short, not only is there no reason to present constitutional arguments to a Local Board, as Mr. Justice Harlan suggests, the Board procedures admit of no means for so doing.

> "... the fact that a registrant may not be represented by counsel in Selective Service proceedings, 32 C.F.R. 1624.1(b) seems incompatible with the boards' serious consideration of such purely legal claims. Indeed the denial of counsel has been justified on the ground that the proceedings are non judicial." 1 S.S.L.R. at 3217.

Registrants are not only unrepresented by counsel before their boards but are young, frequently ill-educated and ignorant of the intricacies of Selective Service procedures. They may be intimidated by their boards, misled as to their rights and not provided with information as to the existence or identity of Selective Service advisors who might be of assistance to them. Though informed on the back of their Notice of Classification of certain duties required of them, they are not informed, even in so casual a manner, of the consequences of failure to promptly comply with those requirements. The registrant may have no real sense of what deferments are even available to him and hence even if he knows of and understands his rights to a personal appearance and appeal, he may not know the grounds for contesting his classification. With such pitfalls as these built into the administrative procedure, it is unconscionable to suggest that the unwitting registrant is bound by his failure to raise and protect all of his constitutional arguments before his Local Board. Cf. *Application of Gault*, 387 U.S. 1 (1967); *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Cornley* v. *Cochran*, 369 U.S. 506 (1962); *Lockhart* v. *United States*, No. 21,311 CA 9th Cir. (October 23, 1968).

The court below has apparently confused notions of "exhaustion of remedies" with those of "finality of decision". While a registrant may not simply avoid adminis-

trative procedures and appear prematurely in court, once the final determination of the registrant's status has been made, the issue is ripe for judicial review. This distinction is likewise made clear in Justice Harlan's concurring opinion in *Oestereich*:

> "... the boards can provide no remedy for a registrant's claim that the regulations or statutes are themselves invalid. (This is not to say that a registrant making such a claim may come into court before he has exhausted his administrative appeals, for the system may decide in his favor on other grounds, obviating the need for further review.)" S.S.L.R. at 3218.[2]

There was, in the instant case, nothing more that petitioner could do, nor indeed was there anything more that the System could do to petitioner prior to his prosecution that could obviate the need for judicial review. Hence, there being nothing waived by petitioner before his Board and all Selective Service decisions affecting petitioner being

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[2] In *Falbo* v. *United States*, 320 U.S. 549 (1944) and *Estep* v. *United States*, 327 U.S. 114 (1946), this court ruled that a registrant must participate fully in the administrative process even to the point of reporting for induction and if he, at that point, refuses to submit, he may request judicial review of his classification. Cf. *Lockhart* v. *United States*, No. 21,311, Ninth Circuit Court of Appeals, October 23, 1968, see opinion of Circuit Judge Browning concurring. The purpose of this rule clearly was to avoid having to judicially confront and determine issues which could either have been resolved by administrative action or otherwise obviated, viz. by physical examination where the registrant was found unfit for service.

Petitioner herein did participate as fully as he could in the administrative process going "to the brink" before seeking judicial review. And as to constitutional arguments, *Falbo* and *Estep* are inapplicable as a matter of law, no purely legal or constitutional question could be settled finally by the administrative process. The petitioner having exhausted the available administrative process and being found physically fit, has entered the court with a "final" administrative decision ripe for judicial review.

final, the courts below should have considered the merits of his defense in the criminal proceedings.[3]

While a registrant can reasonably be assumed to be aware of at least some of his rights to a classification or to a deferment and can conceivably make an effective waiver thereof, it would be most unusual for those subject to Selective Service to be cognizant of their possible constitutional protections under the System, and to be able to waive such sophisticated protection. Without early participation of counsel this would not be possible. In practice what happens is that most of the subjects of the system have no real knowledge of how it operates or of what it produces in terms of general or specific results.

DuVernay could not waive what he did not know, nor could he waive what it was impractical for him to know. He certainly did not know that he could not sue in advance of reporting for induction for judicial review of his reclassification.[4] There was also no real way to know the

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[3] Judicial review of Selective Service cases has for many years been recognized to include consideration of whether the registrant was denied basic procedural fairness in the Selective Service proceedings. *Parrott* v. *United States,* 370 F.2d 388 (1966), cert. den. 387 U.S. 908; *DeRemer* v. *United States,* 340 F.2d 712 (1965); *Blalock* v. *United States,* 247 F.2d 615 (1957); *United States* v. *Peebles,* 220 F.2d 114 (1955).

[4] See 50 U.S.C. § 460(b)(3).

"No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under Section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: Provided, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President *only when there is no basis in fact for the classification assigned to such registrant.*" (Emphasis added.)

procedure by which the Board had reclassified him or had reconsidered his case and refused his plea for deferment. Finally, he could hardly have had access, short of a criminal trial, to the fact that members of his race were excluded from his Board, and that its chairman was the President of the United Klans of America, Inc.

Even though the Court below sought in its opinion to distinguish *Wolff* v. *Selective Service Board No. 16,* 2nd Cir. 1967, 372 F.2d 817, as a first amendment case, it was concerned enough with the waiver question to write:

> "Though we do not believe the reasoning of *Wolff* is applicable to the instant case, we are moved to express doubt as to the continuing validity of that decision. Congress amended 50 U.S.C. App. § 460(b)(3) in 1967, several months after the decision in *Wolff,* in such a way as to emphasize that exhaustion of administrative remedies is a prerequisite to judicial review:"

It is difficult to see where, under the definitions contained in § 460(b)(3), DuVernay failed to exhaust his administrative remedies since he responded to the Order of Induction by making a personal appearance. He simply did not allow himself to be inducted.

If the court below relies upon § 460(b)(3) to support its exhaustion theory, we must say that we think § 460(b)(3) is unconstitutional. This amendment to the Act attempts to declare that neither this court nor any other Federal Court can, in any way, review the decisions of a Selective Service Board if the Board has acted to classify a registrant with *"some basis"* in fact. This is an attempt to restrict the jurisdiction of this and the other Federal Courts over constitutional issues without amending the Judiciary Act of 1789.

It can be conceded that review of *classification* could be withheld from the judiciary if there was "some" basis in fact for the board's action. Here, however, § 460(b)(3) would preclude judicial review of "jurisdictional", i.e., *constitutional* issues in such a situation. This is something new. It also is incorrect. A Selective Service Board may have classified an applicant on the clear basis of "some" facts but it may also have done so in a most flagrant and unconstitutional way. Obviously in such a situation, the due process issues must be reviewable by the Federal Courts and at the very least, in the defense of a criminal prosecution. As § 460(b)(3) would put it, however, where there is some "basis in fact" for the classification, such "jurisdictional" or "processing" (i.e., due process), review would be foreclosed.

Therefore § 460(b)(3) does not, by its own terms, belong in this set of facts since DuVernay *did* respond to the induction order, and moreover it cannot constitutionally be an impediment to a judicial review of the due process or jurisdictional questions in this case, since to make the availability of such review rest on what amounts to the scintilla rule, is to give a veto power to administrative boards over federal courts on constitutional issues.

DuVernay's Board has no jurisdiction to consider its own procedures or composition. This is what is meant by the holdings in *U.S.* v. *Peebles,* 220 Fed. 114 (1955), and *Niznik* v. *U.S.,* 173 F.2d 328. In *Peebles* the Seventh Circuit held:

> "(1-3) Defendant, under due process, had a right to have the Board consider his evidence fairly and without prejudice. 'A draft board loses jurisdiction when it proceeds arbitrarily and without due regard to the rights to which a registrant is entitled under the regu-

lation.' Niznik v. United States, 6 Cir. 173 F.2d 328, 336. The record before us clearly demonstrates that the Local Board did not give defendant a fair hearing on his claim for exemption as a conscientious objector. Apparently the Board was of the view that because defendant did not make his claim when he executed his questionnaire nor at the time he attempted to obtain a II-C classification, that he could not later obtain a classification as a conscientious objector. The persistence of defendant in pressing his claim engendered antagonistic feelings against him by the Board members. It was soon apparent that the entire Board was bristling with hostility toward defendant. This was shown at the time the Board was required to reopen the case to consider defendant's claim for exemption as a conscientious objector. The Board did finally reopen the case 'reluctantly'. The chairman of the Board voted to reopen 'with the greatest feeling of shame and reluctance', the secretary was of like mind while the third member voted against reopening in spite of the request made by General Hershey and the Regulations notwithstanding. As might be expected the Board made short shrift of defendant's claim for exemption by voting on the same day that he be given a I-A classification once again."

While the administrative appeal process may be a valid method of review of classification and other discretionary matters such as deferments, it cannot be the method of review of a refusal to be inducted based on constitutional grounds since at that point it becomes a court matter and actually the Selective Service System has completed its job. See *Gibson* v. *U.S.* (1946), 329 U.S. 338.

If the boards alone could finally pass on such questions, the answer would be foreclosed in favor of the Selective Service System. Obviously, the System is not going to eliminate its own boards, or void its own procedures. There is no way within the act for this to be done. The only review of these issues lies with the courts. *Estep* v. *U.S.*, 327 U.S. 114, 66 S.Ct. 423 (1946).

In *Estep* the court decided this very situation. There the refusal was to be inducted and the court said there *is* a right of Judicial Review of these so-called *final* orders of the Board. In *Estep* it was claimed that the Board by being arbitrary, had lost jurisdiction. The Court agreed and held that the right of judicial review was unimpaired.

When the courts classify a constitutional defense to a criminal charge as waived, they then say in effect that what cannot be done in selective service cases will be done in habeas corpus cases. In *Fay* v. *Noia*, 372 U.S. 391 (1962), this Court held that where there were no available state remedies to exhaust, even though there had been some available at some times in the past and they had not been taken advantage of, that still, Federal Review of the constitutional rights of the accused were available. In effect the Court below invites the accused to enter the Army and petition for habeas corpus. That method of relief as we all know is certainly inappropriate.

Mr. Justice Douglas in *Estep* v. *U.S.* (*supra*), wrote:

> "It has been assumed that habeas corpus is available only after a registrant had been inducted into the Armed Services. But if we now hold that a registrant could not defend at his trial on the ground that the local board had no jurisdiction in the premises, it would seem that the way would then be open to him

> to challenge the jurisdiction of the Local Board after conviction by habeas corpus. The court would then be sending men to jail today when it was apparent that they would have to be released tomorrow."

The court then established that Judicial Review is available and ordered new trials where the defendants were to be given an opportunity to show that their local boards had exceeded their jurisdiction.

Mr. Justice Murphy, in concurring, pointed out then what has happened here:

> "To sustain the conviction of the two petitioners in these cases would require adherence to the proposition that a person may be criminally punished without ever being accorded the opportunity to prove that the prosecution is based on an invalid administrative order . . . (that) violates the most elementary and fundamental concepts of due process law."

Further, on this point—if DuVernay could not sue in advance for classification review, and if the board not only lost jurisdiction by abandoning due process but never had power at all over constitutional issues, and these points could be effectively waived before a criminal trial, then they may as well have never existed at all as far as this defendant is concerned. He would simply go to jail regardless of the Constitution. See *Hart* v. *United States,* 391 U.S. 956, 959 (1968) (dissent).[5]

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[5] Furthermore, the doctrine of exhaustion cannot apply to constitutional questions because:

> "[T]he Appeal Boards in the Selective Service System do not appear to have jurisdiction to pass on constitutional questions;

Finally, the opinion below, based on waiver, is inconsistent with that long line of cases in the 5th Circuit truly represented by *Seals* v. *Wiman*, 304 F.2d 53 (1962). In effect, the court below is saying that a young Negro registrant who knows only that students aren't drafted, but unknown to himself has a perfectly good hardship deferment, and who had no lawyer and who had no knowledge of the procedures of the Board intelligently waived all rights not only to the deferment, but to his constitutional guarantees of due process and equal protection.

How did DuVernay know that by helping his mother support herself and his 6 brothers and sisters he had a claim which any reasonable Draft Board would honor as a deferment?

How did DuVernay know that he was classified in reality by the clerk of the Board and not the Board itself—all contrary to the regulations?

How was DuVernay to know that the chairman of his Board was president of the United Ku Klux Klans of America?

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nor may registrants appeal such questions to them . . . The Appeal Board's jurisdiction is limited to review of decisions of the Local Boards . . . and nothing in the Act or Regulations indicates that Local Boards may pass on the constitutionality of a peacetime draft . . .

[E]ven if petitioner's Appeal Board could have considered the constitutional question raised here it seems clear that an appeal on such ground would have been a futile gesture [see *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817, 825 (C.A. 2d Cir.)], since it would be the equivalent to asking the Selective Service System severely to undercut its own authority and to overrule itself (see *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 539; 3 Davis, Administrative Law, Section 20.04 (1958). 391 U.S. at 960.

How was DuVernay to know that while his board recalled induction notices to policemen it wouldn't [illegible] those sent to poverty workers?

How would DuVernay, a Negro, know that no Negroes had served on his Draft Board for the last five years?

In short, how was DuVernay to know that his board operated pretty much as it pleased and simply ignored the rules?

The answer to the above questions obviously was not only that he didn't know these things, but couldn't. In fact most of them would never have been known had there been no prosecution. If this is the case, and it is, then how can DuVernay, then without a lawyer, be any more able to waive his right than Willie Seals was able to waive his?

Clearly, there was no waiver here. The matter should be reversed.

III.

Petitioner Did Exhaust All Administrative Remedies Known to Him Relating to All Matters Within Administrative Competence and Exercise.

The critical error in the decision below brought to this Court for review lies in the following reasoning of that Circuit Court:

> "On this appeal, DuVernay relies principally on the argument that the indictment against him should have been dismissed by the district court because Negroes have been systematically excluded from membership on Local Board No. 42 * * * In addition to this contention, he alleges that he is entitled to a new trial because the local board's method of handling his case reflects a denial of due process. Finally it is alleged that the trial judge committed reversible error when he refused to permit questions concerning the Ku Klux Klan affiliations of the man who was chairman of the board when appellant was classified I-A.
>
> "We affirm the conviction on the ground that all of appellant's contentions are foreclosed by his failure to exhaust administrative remedies."[6] 394 F.2d at 980.

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[6] In order to make clear the fact that but for the alleged failure to exhaust administrative remedies, petitioner would not have been subject to induction, petitioner directs the court's attention to the following language in 394 F.2d at 982: "We further conclude that appellant could have obtained a deferment subsequent to his reclassification if he had taken the appropriate steps and given appropriate reasons." Thus it is arguable that even the court below recognized that only petitioner's failure to make certain information known to his Board within a space of ten days time has led to his notice to report for induction, indictment, conviction and a pending jail sentence.

The issues underlying the court's conclusion are first, whether petitioner did in fact exhaust all the available and effective administrative procedures, and second, what consequences flow from petitioner not having pressed his constitutional arguments before his Local Draft Board. There can be no doubt about the fact that petitioner presented to his Local Board all the *facts* relevant to his draft status. No facts relating to his draft classification were raised for the first time at trial. A brief review of the chronology of his processing divides logically into the following two periods:

i) On January 19, 1966, upon learning that petitioner was no longer enrolled in college and thus no longer entitled to II-S status, the Local Board classified him I-A. Petitioner did not appear personally at his Local Board to protest that classification. He did not appeal it. He did nothing to contest his I-A status for one and only one reason: He was neither medically unfit, occupationally deferrable, deferrable due to hardship or dependency, or deferrable as a student—in short, there was no appeal taken because *there was no basis for an appeal* within ten days of receipt of the January 19, 1966 reclassification.

The Court below, however, completely ignoring the critical fact that no appeal was taken because there was no ground for appeal, characterized the situation as follows:

> "Yet, he made no effort to appeal his I-A classification until he received an order of induction. By this time he had waived his administrative remedies. Section 1624.1(a) of the regulations requires as a first step in the appellate process that a registrant file a written request for personal appearance before the board within ten days from the time the board mails a notice of

classification. After the ten-day period has expired, there can be no personal appearance. . . . [h]e waived his right to a personal appearance and his subsequent right to appeal . . ." 394 F.2d 980-981.

To view the failure of petitioner to pursue a totally empty and futile appeal as an essential prerequisite to taking subsequent newly-relevant effective appeals or to raising constitutional issues in a criminal trial is to create a Selective Service regulation where none now exists and to raise serious and substantial question as to the constitutional validity of such a rule. The language of the court below suggesting that petitioner "had waived his administrative remedies", 394 F.2d at 980 is therefore wholly inapposite unless this court affirms the decision below which would require the pursuit of an empty appeal in order to preserve the subsequent right to a meaningful and substantial one.

ii) In approximately March, 1966, petitioner became employed in a job which could provide a basis for a II-A[7] occupational deferment. A substantial portion of his salary therefrom was given to the support of his family, thereby forming the basis for a III-A,[8] hardship dependency deferment.

The Notice of Classification which had been issued to petitioner in January, 1966, contained the following information on the back of the card:

"The law requires you to notify your local board in writing (1) of every change in your address, physical

[7] See 32 C.F.R. §§ 1622.22 and 1622.23.

[8] See 32 C.F.R. § 1622.30.

condition, and occupational, marital, family, dependency, and military status, and (2) of any other fact which might change your classification within 10 days after it occurs."

Assuming *arguendo* that this form of notification on the reverse side of the card is sufficient notice of the requirement to report the new employment secured, it can hardly be argued that failure to give such information within ten days can be held to be a waiver of the right thenceforth even to present it. Petitioner, in 1966, was a twenty-year old youth with little more than a high school education. He had absolutely no way of knowing—short of reading all of the regulations governing Selective Service procedure—that failure to notify the Board of his newly undertaken employment within ten days would foreclose his right even to rely upon it. In such circumstances, there can be, as a matter of law, no knowing and intelligent waiver of his rights. As this Court stated in *Application of Gault,* 387 U.S. 1 (1967):

"... [Petitioner's mother] testified that she knew that she could have appeared with counsel at the juvenile hearing. This knowledge is not a waiver of the right to counsel which she and her juvenile son had, as we have defined it. They had a right expressly to be advised that they might obtain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right. * * * Mrs. Gault's knowledge that she could employ counsel was not an 'intentional relinquishment or abandonment' of a fully known right." 387 U.S. at 41-42.

Petitioner's Local Draft Board did not in fact treat the expiration of the ten day time limit as an absolute bar. Instead, subsequent to sending petitioner his notice to report for induction, the Local Board accepted, for some sort of consideration, evidence relating to petitioner's changed status.

The procedures prescribed for processing such information appear in Selective Service regulation 1625.2.[9] In relevant part, 1625.2 allows for reopening and reconsideration of a registrant's classification upon the presentation of facts not considered when the registrant was classified " . . . which [facts], if true, would justify a change in the registrant's classification."[10] Thus if the registrant presents evidence sufficient to warrant a change in his classification, the Board will reopen his file and reclassify him. If the Board, after reopening the file, decides not to reclassify the registrant,[11] he then has a right to appeal the Local Board's decision. 32 C.F.R. 1625.11.

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[9] The full text of that regulation is set forth in the Appendix hereto, p. 57.

[10] Section 1625.2 specifically notes that no reopening is possible subsequent to the issuance of an Order to Report for induction unless there has been a change in the registrant's status subsequent to the issuance of the order resulting from circumstances beyond the registrant's control. The Board however proceeded to give attention to petitioner's status despite the prior issuance of the Order to Report and hence apparently did not consider itself bound to refuse to receive such evidence.

[11] As 1625.2 permits reopening only where the evidence presented to it, if true, would justify a change in classification, it must be assumed that the only occasion for reopening but not reclassifying is one in which registrant's claim of occupational, hardship, or other deferment is not borne out by the facts, i.e., he, in fact, has no job in the national interest or is not in fact, supporting his family. No such contest as to the *facts* presented by petitioner herein was ever even suggested. Indeed, as the Court below stated, " . . . there is

Section 1625.11[12] provides that any action of the Board subsequent to reopening is tantamount to a new classification and is subject to appeal as a new classification. In other words, once the file is reopened, if a new classification is given *or* if the old classification is retained, the registrant has a right to an administrative appeal of the Board's decision.

While it is clear that subsequent to reopening, a registrant may appeal the Board's decision, it is equally and crucially clear that:

1) If the Board decides *not* to reopen a file, *no* appeal of that decision is available, and

2) Petitioner's Local Board, though informing him in one instance that it had "given careful consideration" to his claim, and in another instance, considering his claim without ever notifying him at all to that effect, never made clear whether the file had been reopened, thereby giving rise to an appeal or whether no appeal lay due to the failure to reopen.

The Court below having suggested that the facts presented might have led to a deferment but for their "untimely" presentation, 394 F.2d at 982, petitioner may only assume that for reasons unknown and, according to Selec-

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no reason to believe that the Local Board, or at least the Appeal Board, would not have granted another deferment if legitimate reasons had been presented within the *prescribed time limits.*" 394 F.2d at 982. (Emphasis added.) Thus it is unlikely that the Board did reopen petitioner's file but decided not to change his classification as such event could only occur if the facts do not bear out the registrant's claim for deferment and no such circumstance was ever suggested in this case.

[12] The full text of Section 1625.11 is set forth in the Appendix hereto, p. 58.

tive Service file procedure, unknowable, his was not reopened and no appeal from the Board's refusal to reopen was available.

The Court below did not recognize the fact that once grounds for challenging his I-A classification existed, petitioner presented all those facts to his Local Board, the only "forum" available to him. Rather, the Circuit Court stated:

> " . . . the board is powerless to reopen a classification after the order of induction has been mailed unless it specifically finds there has been a change in the registrant's status resulting from circumstances over which he had no control. There is no evidence that DuVernay's status changed in this way after the order of induction was mailed. Thus, the mailing of the order of induction extinguished his last right of administrative appeal before he had even begun to challenge his I-A classification." 394 F.2d at 981.

Although the letter of the law, Section 1625.2 in fact forecloses reopening after the Order issues unless new circumstances beyond the registrant's control appear, the Board appears not to have followed that interdiction. Had it done so, the language of the Circuit Court would correctly represent what had in fact happened. Evidence is available and appears throughout the transcript of the trial establishing the fact that the Board considered petitioner's status subsequent to the issuance of the Order to Report, despite the limitation on *newly* relevant circumstances. That such procedure is not uncommon is borne out by the record in *United States* v. *McKart,* 395 F.2d 906 (C.A. 6, 1968). In *McKart*, the registrant's Local Board, subsequent not only to issuance of the Order to Report but after the effective

date of the Order had passed, reclassified the registrant from I-A to IV-A on the basis of a fact appearing on the registrant's initial registration form and existing for close to twenty years. Surely this information forming the basis for IV-A deferment could hardly be characterized as new matter arising out of circumstances beyond the registrant's control.[13]

In sum it must be assumed that although 1625.2 purports to foreclose Board consideration of facts not previously considered if not notified within ten days of their existence or prior to issuance of an Order to Report for Induction, the Local Board in this case did give attention to these facts when they were presented. Assuming some consideration was given the facts of employment and support of the family, the question resolves into whether the Board refused to reopen petitioner's file or whether the file was reopened but the I-A classification retained. As no allegation impugning the truth of petitioner's claims for deferment was ever made and given the Circuit Court at least tentative conclusion that they could form the basis for deferment, it must be further assumed that the file was not reopened.

The distinction between determining whether to reopen a registrant's file and reopening the file but not reclassifying the registrant is one of such technical nicety as virtually to elude definition. What in fact occurs is that the registrant submits—unaided by any guidelines, either written or oral in the Selective Service regulations or from the

[13] McKart was later reclassified I-A by his Board but failed to attempt any administrative appeal or to appear for induction and refused to submit. That case comes before the Court, therefore in a posture quite dissimilar from the instant case.

Board—whatever evidence he hopes will establish his right to a deferment. That evidence is then "considered" by the Board. If the file is reopened, the right to appeal follows any Board determination. See 32 C.F.R. 1625.11.[14] If the file is not reopened, no appeal lies. It is in this grey area of refusal to reopen that the most serious damage to a registrant's rights occurs. Recognizing this situation in a case where a request for conscientious objector status was made subsequent to issuance of an Order to Report, the Court of Appeals in *Miller* v. *United States,* 388 F.2d 973 (C.A. 9, 1967) stated:

> "The local board did not deal with the alleged facts or evidence of appellant's conscientious objector form as a question of whether this legally could provide basis for a reopening to be made . . . It shortcut the situation by directly proceeding, without purporting to reopen, to a consideration of whether appellant was entitled to a conscientious objector classification on the merits of the probative elements of its file." 388 F.2d at 976.

To sanction the use of such procedure which foreclosed the possibility of administrative review of the Board's decision was held " . . . to constitute a matter of basic unfairness and hence to be, in the language of *Bolling* v. *Sharpe,* 347 U.S. 497, 499 . . . and *Schneider* v. *Rusk,* 377 U.S. 163, 168. . . . 'so unjustifiable as to be violative of due process' " 388 F.2d at 977. See also *Stain* v. *United States,* 235 F.2d 339 (C.A. 9, 1956); *United States* v. *Garcia,* 1 S.S.L.R. 3016

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[14] If the file was reopened in petitioner's case, he was never so informed and had no way of knowing that an administrative appeal was then available to him.

(1968); *United States* v. *Baker*, 1 S.S.L.R. 3017 (1968). If, as suggested, petitioner's Local Board considered the evidence presented to it on the merits subsequent to April 13, 1966, then petitioner should have been given notice of a right to appeal the Board's failure to reclassify him. Short-cutting and circumventing appellate rights by summary "refusal to reopen" can only be waived as a denial to petitioner of fundamental rights of due process requiring the attention of a federal judicial forum. The refusal of the court below to even countenance such arguments is itself a violation by the court of petitioner's right to due process of the law and should be reversed. The court below stated:

> "Moreover a registrant cannot escape the requirement that administrative remedies be exhausted by complaining, as appellant does, of a lack of due process in his local board classification. * * * Since appellant failed to take administrative steps available to him before attempting a collateral attack on his classification in a prosecution for refusing to submit to induction, his contentions before this Court are foreclosed as a matter of law." 394 F.2d at 981.

This view of what in fact was presented to the Local Board is wholly and completely erroneous. Petitioner did *not* fail to present to his Local Board any facts which he subsequently sought to raise in the criminal trial which related to matters within the Board's competence and jurisdiction. His only error in that regard was that he did not inform the Board within ten days of assuming his employment that he had done so. However, his Board "considered" those facts relating to occupational and dependency deferment when presented by relaxing the rule

of Section 1625.2 insofar as it proscribes consideration, after the Order to Report issues, of matters not newly arising out of circumstances beyond the registrant's control. That Boards are required to consider matter not before them at the prior classification if there is a prima facie case for deferment was settled by *Miller* v. *United States, supra; United States* v. *Freeman,* 398 F.2d 246 (1967); *United States* v. *Stafford,* 389 F.2d 215 (1968); *United States* v. *Gearey,* 368 F.2d 144 (1966). According to these precedents, the only way that the local boards can deny a re-opening of the registrant's classification is if the claim is patently frivolous or insubstantive. As petitioner did present a prima facie case for at least one if not two bases for deferment, his file should have been re-opened and reconsidered so that he would be afforded the right of appeal if necessary from the Local Board's decision. The failure, therefore, was not on the part of petitioner but rather on the part of the Board. Petitioner has been penalized and severely so, through no fault of his own and his conviction should therefore be reversed.

IV.

The Procedures of the Board Ignored Fundamental Due Process Criteria in Processing This Registrant.

A. The Board below either reopened this registrant's case in April and May of 1966 or it did not. If it did, then by denying him an appeal due process is lost. The Board, in order to justify a reopening must have found that the criteria of Section 1625.2 had been met, otherwise they would have refused to consider his application. That they did not do this is shown by the letters DuVernay #4 and DuVernay #6. In all likelihood they made the perfectly reasonable assumption that a 20 year old youth who finds himself with the first real steady job in his life will be compelled by his conscience to help support his mother and six brothers and sisters who had been deserted by his father many years before, and that this was a change of circumstance over which he had no real control.

However, the minutes of the board meeting of April 27th (DuVernay #9) do not show any consideration of the DuVernay case even though the letter of the 28th states otherwise (P#4). If, in fact, the board knew nothing of the two reports of oral information on file in this case (P#1 and P#2), this meant that the clerk, acting for the board, arbitrarily withheld these reports from the members, reopened this registrant's case herself, and denied his request for a hardship deferment. For the Clerk not to show the papers to the Board is an obvious denial of due process since it deprives the registrant of even the possibility of a hearing.

B. Finally, it becomes clear from the evidence here that the board had almost completely delegated its authority and responsibilities in "routine cases to the clerk" (R. 45-54). This is inconsistent with the requirement of 50 App. U.S.C. § 460 which requires that the power and authority by which these registrants are called upon to serve be first and last vested in a civilian board of their friends and neighbors.

Section 460 of Title 50 App. U.S.C.:

> "(3) to create and establish within the Selective Service System civilian local boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the registration, examination, classification, selection, assignment, delivery for induction, and maintenance of records of persons registered under this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], together with such other duties as may be assigned under this title [said sections]: . . ."

This requirement of law does not at all compare with the following testimony of the members of Board #42:

> "Q. That's what I'm getting at, Mr. Lizana. This shows the classification of five hundred registrants, and now my question is, did you all vote on those five hundred as a group, or individually, or how?
>
> "A. Five hundred as a group—I don't quite understand your question, sir.
>
> "The Court:
>
> "Q. His question is, did you consider each case individually, or did you consider the whole group at one time in your vote.

"A. Sir, the way that is done, and it is pretty much routine with all Draft Boards, I'm sure, is that one man will say that we are classifying a man as whatever classification it may be because of such and such, and then the Board will concur on the vote.

"Mr. Smith:

"Q. Isn't it a fact, Mr. Lizana, that you and your clerk, who does most of the clerical work for you in preparing this list, just—that you just draw up a list of the names of applicants or registrants, and in this case there are five hundred eighty-four listed here, and don't you just present those to the rest of the Board and vote on them in a lump sum?

"A. Well, now, the clerk does categorize the applicants or registrants, and then the Board votes on these, but not as a lump group, but as individuals.

"Q. Mr. Lizana, are you telling us now that you voted five hundred eighty-four times that day?

"A. If that was the number of registrants, yes.

"Q. Well, this shows five hundred eighty-four registrants that day. Are you saying now that you took five hundred eighty-four ballots that day?

"A. No, not ballots, sir.

"Q. Well, how is your vote recorded?

"A. It's an oral vote.

"Q. Oral vote?

"A. Yes sir.

"Q. All right, I'll ask the question again, did you vote five hundred eighty-four times that day?

"A. If there are five hundred eighty-four names on there, I suppose I did.

"Q. I'm going to show you this document again, Mr. Lizana, and I have reference here to the first part, which says that there were five hundred eighty-four registrants classified by the Local Board that day, would you agree to that? Isn't that what it says?

"A. Yes, that's right.

"Q. Did you vote for them as a lump, as a group, or did you vote for them individually?

"A. Individually, sir.

"Q. Are you also saying, sir, that of these five hundred eighty-four votes, every one of them was a vote of five to nothing, a unanimous vote, is that right?

"A. That may be, sir. I don't know. I can't tell you just from memory on that.

"Q. Well, I would just like for you to confirm that, if you would, sir.

"A. That's what it says.

"Q. Now, do you recall voting five hundred eighty-four times, I mean of your own independent recollection, that day?

"A. No, I don't. I don't recall voting that number of times. I wouldn't be able to remember that.

"Q. You don't recall voting five hundred eighty-four times then?

"A. No sir.

"Mr. Martin:

"Q. And is it fair to say that you assign classifications to the routine cases, or maybe I should say to the ones that present no immediate problems, first, and then go on to the individual cases that might have some problem presented; is that about the way it goes?

"A. Yes sir, that's right.

"Q. And those that present problems, you discuss in pretty good detail, I take it, is that right?

"A. Yes, that's right.

"Mr. Smith:

"Q. Now, Mr. Bozonier, I note here, according to these minutes, that the classification of five hundred eighty-four people was determined by majority vote of the Board that night, is that correct?

"A. Yes.

"Q. How was that accomplished, sir? How was that vote taken on that many registrants?

"A. Well, they are categorized by the Draft Board clerk, and then they are divided up, and each of us takes so many and studies it and decides on the classification, and then we concur with one another on them.

"Q. That is more or less routine, would that be correct, Mr. Bozonier?

"A. Yes, I would say so.

"Q. Now, how about these that follow, with a little bit more description? Would you call these non-routine cases that are listed below here?

"A. Yes, that would be correct. We spend a little more time on those.

"Q. You mean the Board members?

"A. Yes, we talk to one another about them."

Not only did this clerk effectively pre-judge the registrants of this Board, including the appellant here, and also keep the minutes of the Board, but the Board members carefully described that, on one occasion (January 20, 1966) they individually considered 584 files (including DuVernay) by studying them, discussing them briefly and

then individually voting on them while later (or before) considering "non-routine" business at greater length—all in a space of three hours. If these Board members did nothing at the January meeting except consider routine matters, it would amount to some twelve seconds per registrant—due process could hardly be met by such a performance.

In short, the Board members do not present a candid or even realistic account of the internal due process of this Board's meetings. The testimony of the Board in *Peebles*[15] and *Niznik*[16] was much more believable. While those boards presented an open and admitted hostility to the registrant, these Board members attempted to conceal a laziness, an indifference, a lack of responsibility and a failure to realize the awful effect their power had over the lives of those entrusted to their care and authority.[17] This

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[15] *U.S.* v. *Peebles*, 220 F.2d 114 (1955).

[16] *Niznik* v. *U.S.*, 173 F.2d 328.

[17] This appears to be standard procedure for Board #42. Defendant's Exhibit #8 (Board minutes for March 23, 1966) shows a policeman obtaining a recommendation from the Board to the State Selective Service Director that his previously ordered induction be indefinitely postponed—a form of recall of their prior order. This amounts to a backhanded deferment, this is clearly in violation of Section 1625.3 wherein the regulations require the Board to reopen and consider anew only when the State Director requests it, and not the other way around. The pertinent provision follows:

> § 1625.3 "When Registrant's Classification Shall Be Reopened and Considered Anew.—
>
> "(a) The local board shall reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selective Service and upon receipt of such request shall immediately cancel any Order to Report for Induction (SSS Form 252) or Order to Report for Civilian Work and Statement

attitude is much more difficult to assess, to present to a jury and to attack on appeal from a record alone. Because of this, the effect is even more devastating to the registrant; it presents a much stronger case for close scrutiny of board activities, and in this case calls for a remand.

V.

Systematic Exclusion of Blacks From Service on Local Draft Board No. 42 Is a Violation of Petitioner's Rights Under the Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution.

Systematic Exclusion of Blacks from Membership on Petitioner's Draft Board Is a Violation of the Fifth and Fourteenth Amendments.

At the hearing to quash the indictment, petitioner and the government stipulated that no member of the Negro race had served on petitioner's draft board for at least the past five years (R. 8). At trial and on appeal, appellant's efforts to raise the issue of exclusion were rejected. It was error for the Court below to refuse to consider appellant's claim, in that his showing of systematic exclusion of Negroes from his draft board established a violation of appellant's rights under the Fifth and Fourteenth Amendments to the United States Constitution.

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of Employer (SSS Form 153) which may have been issued to the registrant."

The portion of defendant #8 referred to above is as follows:

"Request for deferment filed by the Department of Police in behalf of William T. Roth, 16 42 45 214, scheduled for induction and presently in attendance at the Police Academy was acted on by the board. The board concurred in granting the deferment, thereby requesting the State Director to cancel registrant's induction. . . . "

Pursuant to 50 U.S.C. App. § 460(b)(3) and 32 C.F.R. § 1604.52 the President of the United States appoints members of the local draft boards from recommendations made by State Governors. Traditionally, the President ratifies the Governor's recommendations without further consideration as to the qualifications or race of the people recommended. "General Hershey's top assistants can't remember a time when they ever rejected or scrutinized a man recommended by a State Governor." Hearings before the Committee on Armed Services, 89th Cong., 2d Sess. at 9919. There is nothing that indicates that recommendations made by the Governor of Louisiana were not similarly accepted (R. 7-9). The result in Louisiana of this combined State and Federal action has been to exclude black people from membership on appellant's draft board.

A showing that Negroes have been excluded from membership for the past five years presents a prima facie case of systematic and purposeful exclusion. Cf. *Whitus* v. *Georgia,* 385 U.S. 545 (1967); *Cassell* v. *Texas,* 339 U.S. 283 (1950); and *Patton* v. *Mississippi,* 332 U.S. 463 (1947). Moreover, racial discrimination by a State Governor is a direct violation of the Fourteenth Amendment, *Cooper* v. *Aaron,* 358 U.S. 1 (1958), and it is well-settled law that participation in or ratification of racial discrimination by the Federal Government is equally prohibited by the Due Process Clause of the Fifth Amendment. *Bolling* v. *Sharpe,* 347 U.S. 497 (1954).

Having made a prima facie case it becomes the burden of the government to overcome the presumption of racial discrimination through systematic exclusion with evidence showing that the exclusion resulted from reasons other than racial discrimination. *Patton* v. *Mississippi, supra.*

The government has offered no such explanation either at the time it entered into the stipulation or anywhere in its briefs. It is not unreasonable to assume that blacks were available and eligible to serve as members of Local Board No. 42. Indeed, where there is no evidence to the contrary, this Court is obligated to assume that many black people met the statutory requirements. *Cassell* v. *Texas, supra,* at 289. To serve as a member of a local board one need only "be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction . . ." 50 U.S.C. App. 460(b)(3). With qualifications as general as these it is difficult to imagine that the government can legitimately claim that qualified black people are hard to find,[18] nor can their absence be excused on the ground that recommendations were made from personal knowledge and/or without consideration as to race. In the area of jury exclusion this Court has held that:

> "An individual's qualifications for grand-jury service however are not hard to ascertain, with no evidence to the contrary, we must assume a large proportion of the Negroes of Dallas County met the statutory requirements for jury service. When the commissioners were appointed as judicial administrative officials, it was their duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race or color." *Cassell* v. *Texas, supra* at 289.

* * * * *

[18] In *Louisiana* v. *United States,* 225 F.Supp. 353 (E.D. Louisiana 1963), aff'd 380 U.S. 145 (1965) the court found that there were a great number of qualified black voters in the State. The qualifications for voting are certainly equal to, if not more stringent than the qualifications for membership on a local draft board.

> "'Discrimination can arise from the action of commissioners who exclude all Negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve. In such a case, discrimination necessarily results where there are qualified Negroes available for jury service.'" *Cassell* v. *Texas, supra,* at 289, quoting from *Hill* v. *Texas,* 316 U.S. 400, 404 (1942).

In view of the availability of qualified Negroes, there is, then, no legitimate explanation for the long and continued absence of black members on appellant's draft board. The failure to recommend and appoint a black member has, necessarily, resulted in systematic racial exclusion.

Appellant has a right to be classified "in accordance with a system of selection which is fair and just . . . " 32 C.F.R. 1622.1(b), and free from "discrimination for or against him because of his race, creed, or color. . . . " 32 C.F.R. 1622.1(d). The wide range of discretionary authority available to draft boards is a potential danger to a registrant's right to be free from arbitrary and discriminatory treatment. In *Arndt* v. *United States,* 222 F.2d 484 (5th Cir. 1955) the court recognized the need for "protective safeguards". The court stated that draft boards:

> ". . . have been invested with great authority over the lives and actions of the people and that authority must be exercised only after scrupulous observance of the protective safeguards provided by the Constitution and Statutes," at 486.

In the area of jury exclusion this Court recognizes that the only protective safeguard to insure against arbitrary

and racially discriminatory treatment is to strike down systematic exclusion. *Strauder* v. *West Va.*, 100 U.S. 303 (1880). The need for the same protective safeguard is apparent in the area of exclusion from membership on draft boards. As in the case of juries charged with the responsibility of rendering fair and impartial decisions, draft boards, charged with the same responsibility under the Constitution and by statute are often subject to racial prejudices "which sway the judgment . . ., and which, therefore, operate in some cases to deny to persons . . . the full enjoyment of that protection which others enjoy." *Strauder* v. *West Va., supra,* at 309.[19]

This Court has never required a showing of actual discrimination by a jury from which black people had been systematically excluded. The apprehended or potential danger of discriminatory treatment and lack of a fair trial has been sufficient. *Strauder* v. *West Va., supra; Cassell* v. *Texas, supra; Avery* v. *Georgia,* 345 U.S. 559 (1953); and *U.S.* v. *Rabinowitz,* 366 F.2d 34 (5th Cir. 1966). Systematic exclusion of blacks from draft boards equally threatens the constitutional and statutory right of black registrants to be considered fairly and without racial discrimination. At the time of petitioner's I-A classification the chairman of his local board was a member of the Ku Klux Klan, T. 67. It is inconceivable to think that in race conscious Louisiana an all white draft board headed by a known member of the Ku Klux Klan could fairly

[19] Petitioner is concerned with his right not to have members of his race systematically excluded as distinguished from *Clay* v. *U.S.*, 397 F.2d 901 (5th Cir. 1968) and *Sumrall* v. *U.S.*, 397 F.2d 924 (5th Cir. 1968), cert. den. —— U.S. —— (1968). The 5th Circuit held in these two cases that as a matter of law there is no right to proportional representation of blacks on local draft boards.

consider registrants who are members of the Negro race. The potential for prejudicial treatment under these circumstances is increased beyond the ordinary.[20] The Klan member has been removed, Tr. 67, but appellant still had to deal with an all white board at the time of the board's refusal to grant appellant's hardship and occupational deferments. To hold that appellant is not entitled to appear before a board from which members of his race have been systematically excluded is to deny him one of the most meaningful protections against arbitrary and discriminatory treatment.

Moreover, top government officials agree that support of the Selective Service System depends upon the degree to which it is operated fairly.

> "No system of compulsory service in this country could long endure without the support of the people . . . The people of this country will support a compulsory system only to the extent that they have confidence in its fairness and they will have confidence in a system only to the extent which they themselves operate it." Hershey, Memorandum from General Hershey, S. Doc. No. 82, 89th Cong., 2d Sess. 4.

Citizen participation in the Selective Service process is a concept that was first envisioned immediately after the Civil War. (Report on S.S. p. 20.) Government officials have continued to recognize the validity and importance of this concept. "In its budget justification for fiscal 1967,

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[20] In *United States* v. *Original Knights of the Ku Klux Klan*, 250 F.Supp. 330 (E.D. Louisiana 1965) the Court ruled that the first allegiance of the Klan is to its own constitution and found "that to obtain its ends, the Klan exploits the forces of hate, prejudice and ignorance," at 334.

Selective Service characterized the local boards as little groups of neighbors on whom is placed the responsibility to determine who is to serve the nation in the Armed Forces and who is to serve in industry, agriculture, and other deferred classifications'" (Report of the National Advisory Commission on Selective Service p. 20). The reason for maintaining local boards, the members of which are neighbors from the community serviced by the board, is to assure registrants that they will be dealt with fairly. "'Because of its comparatively long association with a registrant and knowledge of what he has done, the local board is relatively well-qualified to evaluate his ability to perform'" (*ibid.*). A black registrant who appears before a board from which members of his race have been systematically excluded is not afforded the same opportunity for consideration guaranteed to white registrants. For him, there is no chance that his case will ever be considered by a member of his community who is qualified through long association and knowledge of what he has done to evaluate his ability to perform.

During the hearing on the 1967 Legislation under which this defendant was to have been inducted, "the members of the Senate recognized the importance of maintaining a draft board was
local. The chairman, Senator Russell, in responding to the proposal for a "National" Selective Service System, stated:

> "In theory, that may be very well, Mr. Marshall, but the original proposal and objective was to keep this matter as local as possible within the range of each of the Boards to which you refer, on the premise that they had information about family hardship, good faith, personal problems, and conditions that no com-

puter yet devised could possibly ascertain and that they would come as near to the facts as any group could, by knowing that they had to live in that community, with the mothers and fathers of the sons with whose lives they are dealing. * * *

"A man in his own community is going to have to look a registrant in the eye and tell him he is going to serve". *Hearings Amending and Extending the Draft Law and Related Authorities* (April 1967) ("The Senate Hearings"), p. 136.

Senator Stennis had this to say:

"Now I believe I can tell you the reasons this Board works so well, they meet on the streets the next day the very man they passed on in the afternoon of the night before. They meet the family, the mothers, the wives and all the rest in one way or another, some of these members do and they are conscious of that * * *."

"In addition to that, there is a day to day, and week by week, month by month check up on what they did and they know it, and, thinking it's part of the heart and soul and each man's way of showing the backing of the tremendous Military Program . . . (p. 142).

"We are going into the homes of these communities and taking these men out and it is better to be passed on by people who are there and know something about the circumstances" (*ibid.* p. 143).

Accordingly, in the 1967 Selective Service Legislation, there was no change in the requirement that Draft Boards be Local Boards. The Statute continues to require that

members of the Board reside in the County in which the Local Board has jurisdiction. *U.S.* v. *Peebles* (CA 7, 1955), 220 F.2d 114; *U.S.* v. *Dyer,* D.C. W.Va. 1967, 272 F.Supp. 965, affirmed 390 F.2d 611; *Muhammad Ali* v. *Connally,* D.C. Tex. 1967, 266 F.Supp. 345; *U.S.* v. *Salamy,* D.C. Okl. 1966, 253 F.Supp. 616, affirmed 379 F.2d 838. This dealing with policy, the registrant and the Statute has been enforced by the Selective Service System on a continuing basis. See *Report of the National Advisory Committee on Selective Service, supra.*

In addition to the requirement of a "community board of neighbors", to insure that draft boards are representative of the conscience of the community, 50 App. § 460(b)(3) prohibits the exclusion of women. Surely it is unthinkable and contrary to the holdings of this Court to conclude that women have a lawful right to serve as members, but that black men, although protected from racial discrimination by the United States Constitution, have no such right. A Selective Service System that denies to the black man the opportunity to participate, but extends that right to all others, is unfair, unrepresentative of the people and fails to instill confidence in the System's fairness. Unless black people are made to feel that they, as well as their white brothers share in the operation and administration of the Selective Service System, in the words of General Hershey, "No system of compulsory service in this country could long endure."

The constitutionality of the conscription laws has been sustained upon the proposition that it is a duty of citizenship to serve in the military services when compelled to do so. Justice White noted in the *Selective Draft Law* cases, 245 U.S. 366 (1918) that:

> "It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in the case of need and the right to compel it," at 378.

The concept of citizen responsibility for military service in return for the rights and privileges of citizenship was not original with the *Selective Draft* cases. It is a principle deeply rooted in the history and traditions of this nation. That military service is conditioned upon citizenship and the government's guarantee that rights of citizenship will be protected was dramatically, and in no uncertain terms, stated in *Dred Scott* v. *Sandford,* 19 How. 393, 60 Sup.Ct. 691 (1857). Justice Taney, speaking for the Court, proved that black men were not United States citizens by demonstrating that the highest duty of citizenship, service in the militia, was unavailable to persons of African descent. Black men:

> "By the laws of New Hampshire, collected and finally passed in 1815, no one was permitted to be enrolled in the militia of the State, but free white citizens; and the same provision is found in a subsequent collection of the laws, made in 1855. Nothing could more strongly mark the entire repudiation of the African race. The alien is excluded because, being born in a foreign country, he cannot be a member of the community until he is naturalized. *But why are the African race, born in the State not permitted to show in one of the highest duties of citizens? The answer is obvious, he is not by the institutions and laws of the State, numbered among its people. He forms no part*

of the sovereign of the State, and is not therefore called on to uphold and defend it," at 415. (Emphasis added.)

The stigma of inferiority legally followed the black man, whether slave or free, until the enactment of the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution. These amendments were designed to confer citizenship upon the black man, *Slaughter-House* cases, 16 Wall. 36 and in particular the Thirteenth Amendment was designed to eradicate badges and indicia of slavery. *Jones* v. *Alfred H. Mayer Co.*, 88 S.Ct. 479 (1968). Without the complete elimination of the badges and indicia of slavery that maintained the black man in a status of inferiority he will never be a free and equal citizen. The right of citizenship is indeed a hollow right without constitutional and judicial protection against badges and indicia of slavery. Indeed, to deny protection against the stigma of inferiority is "to grant the right but in reality to withhold its privilege and enjoyment". *Mapp* v. *Ohio*, 367 U.S. 643, 656 (1961).

The black man is now required to serve in the military as a citizen of the United States, although he is still stigmatized every day of his life by the badges and indicia of slavery. (See Douglas, concurring opinion in *Jones* v. *Alfred H. Mayer Co., supra.*) His white brother serves because he is a full and equal citizen of this country and is guaranteed state, federal and constitutional protection of his rights as a free citizen. Under the principles of the *Selective Draft* cases, and *Scott* v. *Sandford, supra,* no man is required to offer his life or his body in defense of this nation unless he is a free and equal citizen. This

necessarily means that the federal government will protect his rights as a member of the sovereign body of people called the United States of America.

Only white persons who were citizens of the United States, according to Taney, could serve in the militia. Necessarily, then, only white citizens could participate in the administration of the militia. Black men in this country now have the duty to serve, but are still denied the corresponding right of citizenship to participate in the administration and operation of the Selective Service process. To hold that the black man has a duty to serve as a citizen, but does not have a corresponding right to serve as a member of his draft board is to admit that he is in fact not a full and equal citizen. Such a holding would fly in the face of the guarantees promised by the Constitution of the United States over a hundred years ago.

Constitutional safeguards against arbitrary and discriminating treatment extend to all authorities who "have been invested with great authority over the lives and actions of people." *Arndt* v. *United States, supra* at 486. There is no doubt that had there been actual discrimination against petitioner his constitutional rights would have been upheld by invalidation of the induction order. *Estep* v. *United States,* 327 U.S. 114 (1946). Petitioner, however, has a right not only to be free from actual discrimination but from the threat of potential discrimination as well. *Strauder* v. *West Va., supra.* This Court must fashion judicial remedies that meet realities. *Brooks* v. *Beto, supra.* The jury exclusion cases teach us that the only realistic remedy is to void the order, for it is only then that the potential evils inherent in systematic exclusion are effectively eliminated. Even more reason for protecting the

right against potential discrimination is that it is, in itself, a constitutional safeguard against deprivation of the right to be free from actual discrimination.

By statute petitioner is guaranteed that he will be treated and classified free from racial discrimination. Systematic exclusion of members of his race from membership on petitioner's board violates that guarantee." The authority of the local boards whose orders are the basis of ". . . criminal prosecutions is circumscribed both by the Act and by the regulations." *Estep* v. *United States, supra* at 120. "These rules limit, as well as define, their jurisdiction." *Id.* at 121. A local board, then, whose composition violates the statutory guarantee of non-discriminatory treatment is acting outside of its lawful jurisdiction and its order must be voided.

The due process infirmities exhibited in the record herein infect the Order to Report for Induction so fundamentally as to necessitate its cancellation. It cannot be gainsaid that the recondite procedures of the petitioner's Local Board were unknown to him and that no attempt was ever made to inform him of his rights in any meaningful manner. The assumed failure of the Local Board to reopen petitioner's file, at the very least, to consider his undeniable prima facie claim for occupational or hardship deferment must be reversed and the Board ordered to at least consider the evidence submitted. If a failure to reclassify petitioner at that time results, he will have an opportunity to pursue an administrative appeal.

Unless this Court orders a reversal of the conviction herein, petitioner will be sent to jail for five years without any competent forum ever reviewing his constitutional

claims. To allow this result would be to deny petitioner the most fundamental guarantees of a democratic society: a court of law in which he can, within the rule of law, present his grievances.

Petitioner therefore respectfully urges this Court to reverse the conviction and affirmance thereof by the courts below and to cancel his Order to Report for Induction, thereby allowing him the opportunity to fully and fairly present his case and have it heard.

Respectfully submitted,

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LAW APPENDIX

Statutory Provisions

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIII—Slavery Abolished

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Selective Service Act of 1967

§ 462. Offenses and penalties

(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title [said sections], rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making, of any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title [said sections], or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said sections], or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title [said sections], or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said sections], or any person or persons who shall knowingly hinder or interfere or attempt to do so in any

way, by force or violence or otherwise, with the administration of this title [said sections] or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title [said sections] unless such person has been actually inducted for the training and service prescribed under this title [said sections] or unless he is subject to trial by court martial under laws in force prior to the enactment of this title [June 24, 1948]. Precedence shall be given by courts to the trial of laws arising under this title, and such cases shall be advanced on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of non-residence, or any other certificate issued pursuant to or prescribed by the provisions of this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or

in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title [said sections], or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title [said sections] or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever at trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury.

(c) The Department of Justice shall proceed as expeditiously as possible with a prosecution under this section, or with an appeal upon the request of the Director of Selective Service System or shall advise the House of Representatives and the Senate in writing the reasons for its failure to do so.

June 24, 1948, c. 625, Title I, § 12, 62 Stat. 622; Aug. 30, 1965, Pub. L. 89-152, 79 Stat. 586; June 30, 1967, Pub. L. 90-40, § 1(11), 81 Stat. 105.

1625.1 CLASSIFICATION NOT PERMANENT.—(a) No classification is permanent.

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any

fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

1625.2 When Registrant's Classification May Be Reopened and Considered Anew.—The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

1625.11 CLASSIFICATION CONSIDERED ANEW WHEN REOPENED.—When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.

1625.13 RIGHT OF APPEAL FOLLOWING REOPENING OF CLASSIFICATION.—Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.

1625.14 CANCELLATION OF ORDER TO REPORT FOR INDUCTION OR FOR CIVILIAN WORK BY REOPENING OF CLASSIFICATION. —The reopening of the classification of a registrant by the local board shall cancel any Order to Report for Induction (SSS Form 252) or Order to Report for Civilian Work and Statement of Employer (SSS Form 153) which may have been issued to the registrant, except that if the registrant has failed to comply with either of those orders, the reopening of his classification thereafter by the local board for the purpose of placing him in Class IV-C or Class V-A shall not cancel the order with which he failed to comply.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 814

RAYMOND JOSEPH DUVERNAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 70–76) is reported at 394 F. 2d 979.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1968 (A. 77), and petitions for rehearing and for rehearing *en banc* (A. 77–78) were denied on May 14, 1968 (A. 78). On June 13, 1968, Mr. Justice Black extended petitioner's time for filing a petition for a writ of certiorari to and including June 23, 1968 (a Sunday). The petition was filed on June 24, 1968, and was granted on December 9, 1968 (A. 89).

The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Selective Service Regulation 1625.2, which prohibits a local board from reopening a registrant's draft classification after the issuance of an order to report for induction unless there has been a change in the registrant's status resulting from circumstances beyond his control, is valid and was validly applied in this case.

2. Whether Regulation 1625.2 may be invoked at a registrant's criminal trial for refusal to submit to induction, so as to preclude him from contesting the validity of his I–A classification, when it does not appear whether the registrant had been personally advised of the substance of the regulation.

3. Whether petitioner was foreclosed under the exhaustion-of-administrative-remedies doctrine from contending that the indictment was subject to dismissal on the ground that Negroes allegedly had been systematically excluded from his local board, and whether in any event, the motion to dismiss was properly denied.

REGULATIONS INVOLVED

The pertinent provisions of Selective Service Regulations 1625.1 and 1625.2 (32 C.F.R. 1625.1 and 1625.2) are set forth in the Appendix, *infra,* pp. 39–40.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of refusing to comply with an order of

his local Selective Service board directing him to submit to induction into the armed forces, in violation of Section 12 of the Universal Military Training and Service Act (now the Military Selective Service Act of 1967) (A. 1, 67). On September 7, 1966, he was sentenced to five years' imprisonment (A. 68). The court of appeals affirmed (A. 70–77).

1. In January 1964, petitioner, then 18 years old, registered for selective service with Local Board No. 42 in New Orleans, Louisiana (A. 28, 70). The following month he was placed in Class I–S(H), a deferred classification, on the basis of his status at that time as a high school student (A. 28, 35). Petitioner thereafter filed with his board a "Current Information Questionnaire" in which he inadvertently failed to report that he was still a high school student; as a consequence, on July 29, 1964, he was erroneously reclassified I–A (available for military service) (A. 35; G. Ex. 4, SSS Form 100, p. 8).[1] Four days later, on August 2, 1964, petitioner advised the board by letter that he was still in high school, stating that he could produce written proof of the fact, and requested a personal appearance before the board to discuss the matter (A. 79). On August 4, the clerk of the board called petitioner's attention to his failure to state in his questionnaire that he was still in high school and returned the questionnaire to him with the request that he supply the necessary information (A. 79).

[1] Government Exhibit 4, petitioner's Selective Service file, was admitted in evidence at A. 57 and is on file in the Clerk's office. SSS Form 100, the classification questionnaire, is the first document in the folder.

Petitioner complied and, on August 24, 1964, he was again placed in Class I–S(H) (G. Ex. 4, SSS Form 100, p. 8).

Petitioner's I–S(H) classification expired on June 1, 1965 (G. Ex. 4, SSS Form 100, p. 8). On July 27, 1965, before any change in his classification had been effected, petitioner advised his board by letter that he had completed high school the previous month, noted that his Selective Service "card" had expired on June 1, and reported that he was currently taking pre-college courses at a university in New Orleans. The letter stated that he planned to attend Louisiana State University in the fall, and he said he desired to get another student deferment in order to continue his education (G. Ex. 4, ltr. of 7/27/65). Petitioner did matriculate at Louisiana State University the following September and on November 17, 1965, he was placed in Class II–S, the regular deferred classification for university students (A. 28, 36; G. Ex. 4, SSS Form 100, p. 8).

In December 1965, petitioner abandoned his university studies and during the following month, January 1966, started working as a laborer at a housing project (A. 29, 82–83). On January 19, 1966, he was reclassified I–A (A. 36, 44, 53). On January 28, 1966, he was ordered to report on February 23 for his pre-induction physical examination (G. Ex. 4, SSS Form 223, 1/28/66). Petitioner failed to report as directed—he claimed that he overslept—and he was directed to report for a rescheduled examination on

March 14.[2] He then reported and was found acceptable for induction (G. Ex. 4, DD Form 62) and on April 13, 1966, he was ordered to report for induction on May 20 (A. 14–15).

In the meantime, about mid-March of 1966, petitioner quit his job as a laborer and became employed by the Social Welfare Planning Council, an anti-poverty agency in New Orleans (A. 29, 37–38, 39, 82–83, 86–87).[3] Accordingly to undisputed testimony by his mother at the trial and a statement made by her to the clerk of the local board on April 25, 1966 (see *infra*), petitioner, prior to his change of employment, had been contributing from his wages as a laborer toward the support of his mother and his six younger brothers and sisters, ranging in age from 9 to 17, and his contributions continued and increased in amount following his change of employment (A. 39, 82–83).[4] However, petitioner took no steps at any time prior to his receipt of the order to report for induction to se-

[2] A. 34; G. Ex. 4, SSS Form 223, 3/3/66; G. Ex. 4, SSS Form 100, p. 8; G. Ex. 4, letter misdated 2/23/65 (should be 2/23/66).

[3] The record does not reflect the exact date of the change of employment. Petitioner testified that he had been working on his new job "a couple of months" when efforts were made by his new employer to secure an occupational deferment for him (see *infra*) (A. 33, 37–38). The record indicates that these efforts were being made in the early days of May 1966 (A. 33, 37–38, 86–87).

[4] The respective contributions amounted to $50 and $70 per biweekly pay period. The contributions from his pay as a laborer apparently extended throughout his employment in that capacity, which began in January 1966, approximately three months prior to the issuance of the order to report for induction (A. 39, 83).

cure either a hardship or an occupational deferment, or otherwise to effect a change in his draft classification (A. 16, 38, 81–83).

Beginning on April 15, 1966, after receiving the order directing him to report for induction, petitioner initiated a series of efforts, in conjunction with his mother and employer, to obtain a further deferment from military service on a variety of grounds. On that date he appeared at the office of his local board and advised the clerk, Mrs. Cecile Calmes, that he was planning to return to the University in the fall and desired a renewal of his student deferment (A. 15, 81–82). The clerk advised that it was necessary to be currently enrolled in a school in order to obtain a student deferment; however, she recorded the information supplied on a Selective Service form known as a Report of Oral Information and made it available to the board (A. 17–18, 81–82). Ten days later, on April 25, petitioner's mother, Mrs. Raymond DuVernay, appeared at the board's office for the first time and, in a conversation with the clerk, either requested a hardship deferment for her son or supplied information which, if seasonably presented, might possibly have warranted the granting of such a deferment; she told the clerk that from his wages petitioner had been contributing to her support and that of his six minor brothers and sisters and she supplied the financial details of such support (see note 4, *supra,* p. 5) (A. 16, 17, 39, 82–83).[5] The clerk recorded the infor-

[5] 32 C.F.R. 1622.30(b) provides for the placement in Class III–A of any registrant whose induction into the armed forces would cause extreme hardship to a parent, brother, or sister

mation in another Report of Oral Information and made it available to the board (A. 17–18, 82–83).

At a meeting of the board on April 27, 1966, the information submitted by petitioner and his mother was reviewed and, by a 4–0 vote, the decision was made not to reopen petitioner's classification (A. 54, 80, 85).[6] By letter dated April 28, 1966, petitioner was advised that the information which had been submitted had been considered by the board and that it was the opinion of the board that he should report for induction on May 20, as ordered (A. 85).

Petitioner thereafter sought an occupational (Class II–A) deferment on the basis of his work with the Social Welfare Planning Council (A. 33, 86–87). On May 12, 1966, the associate executive director of the Council submitted a letter to the board describing the

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who is dependent upon him for support. There was a conflict in the testimony as to whether Mrs. DuVernay requested a hardship deferment for her son at the April 25 interview or whether she merely supplied information in support of a request for deferment made previously by petitioner himself. Mrs. DuVernay testified that she requested a hardship deferment at the interview (A. 39). The clerk testified that Mrs. DuVernay supplied pertinent information on this occasion but that the request itself had been made by her son (A. 16, 17).

[6] As petitioner notes at Pet. Br. 33, the minutes of this meeting (DuVernay Ex. 8, A. 83–85), which were kept by the clerk of the board (A. 19), do not reflect the board's action regarding petitioner (A. 85). However, two board members testified that not everything that was discussed at the board meetings was necessarily reflected in the minutes (A. 47, 54) and Board Member Bozonier, who participated in the consideration of petitioner's case at the April 27 meeting, testified that there was a document in petitioner's individual file which showed that the matter was considered (A. 54). The document referred to—a "continuation sheet" of the "minutes of actions" with respect to petitioner—appears at A.80.

work petitioner was engaged in and requesting a deferment on his behalf (A. 86–87). By letter dated May 16, 1966, the Council was advised that its request had been given consideration by the board, but that the request had not been granted and petitioner was to report for induction as ordered (A. 87).

Petitioner reported to the induction center on the date scheduled in the induction notice, informed the officers in charge that he refused to be inducted, and, after the criminal consequences of such refusal had been explained to him, declined to take the single step forward which symbolizes entry into the armed forces (A. 20–26). Following his refusal, petitioner made the following handwritten statement explaining the reasons for his action:[7]

> I feel that because of the intimidation and suppression of and discrimination against minority groups here in the United States, especially we the negro, and because these groups are not fully guaranteed and fully assured their rights as citizens of the United States and because our rights as citizens of the United States are not fully protected by the United States Government, and because of the need for much Civil Rights work and the need for anti-poverty programs, that I should not be inducted into the armed forces to maybe be ordered to fight in a war that I believe our involvement in is unjust, and that we have no business fighting, but instead that I be allowed

[7] G. Ex. 4, attachment to letter dated May 20, 1966, from Lieutenant Keith P. Harrington to the United States Attorney for the Eastern District of Louisiana, entitled "Subject: Notification of Refusal to Submit to Induction."

> to continue in the battle within our borders for the advancement of the underprivileged and to help make equality for all citizens of the United States a reality.

2. Petitioner, who is a Negro, moved prior to trial to dismiss the indictment, alleging, in part, that he had been selected and ordered to report for induction by a board from which members of the Negro race had been systematically excluded (A. 2–3). In its answer to the motion the government denied that Negroes had been systematically excluded from the board (A. 4). At a pre-trial hearing Colonel Douglas Pritchett, a member of the staff of the State Selective Service Headquarters, testified that five members were currently serving on petitioner's board; that since 1948 six other persons had served; that members were appointed by the President from persons recommended by the Governor; and that he, the witness, did not know the race of any of the eleven past and present members of the board (A. 5–6). Pritchett further testified that the race of a registrant is not reflected in his Selective Service file at the time he registers or at any time prior to his physical examination (A. 6–7).

In response to an inquiry by the court, government counsel stated that he had been told that no current member of the board was a Negro and that no Negro had sat on the board during the preceding five years (A. 8). Counsel for petitioner requested and was granted leave to establish through affidavits, if he could, that no Negro had ever sat on the board (A. 8–9), but so far as appears no such affidavit was ever

submitted. At the conclusion of the hearing, the court denied the motion to dismiss without opinion (A. 9).

3. At the trial, the government introduced evidence that petitioner had appeared at the induction station as ordered but refused to submit to induction. Petitioner's "defense", while nowhere clearly articulated in the transcribed record, was apparently that the local board had acted arbitrarily and capriciously in refusing his, his mother's and his employer's requests for his deferment (see, *e.g.*, A. 17, 35, 36, 57).[8] So far as appears, however, this "defense" was not made the subject of a motion for judgment of acquittal; in fact, the record as transcribed contains no indication that a motion for judgment of acquittal was made, either at the close of the government's case in chief or at the conclusion of the entire case (see A. 26–27, 58). However, petitioner did request that the jury be given the following instruction (A. 63):

> A registrant is entitled to full and fair disposition of his contentions at every level of the Selective Service System, and arbitrary and capricious denial of due process makes void an order based thereon * * *.

That instruction was refused.[9]

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[8] Defense counsel's opening and closing arguments to the jury, in which this theory of defense may have been more articulately presented, were evidently not transcribed (see A. 13, 58).

[9] Although the defense apparently did not question the propriety or validity of petitioner's I–A reclassification *as of the time of its issuance* (*i.e.*, as of January 19, 1966), the trial court did instruct the jury—without further elaboration or ex-

4. Following the verdict, petitioner moved for a new trial on the grounds (1) that Negroes had been systematically excluded from his local board and (2) that the board had acted arbitrarily and capriciously, and denied him due process, in denying him the hardship deferment he had applied for (A. 67–68). The motion was denied.

On appeal, petitioner renewed his contentions that the indictment should have been dismissed because Negroes had been systematically excluded from his local board and that the board's method of handling his case had reflected a denial of due process. The court of appeals found it unnecessary to reach the merits of either contention. It affirmed the conviction on the ground that both contentions were foreclosed by petitioner's failure to exhaust his administrative remedies (A. 71).[10]

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plication and, so far as appears, without solicitation by either party—as follows (A. 61):

> The defendant has raised the defense through his counsel that his classification by this particular Draft Board was arbitrary and without any basis in fact. That is something that you as jurors are going to have to determine after considering all the evidence that has been presented in this trial.

[10] A third contention, relating to the trial court's assertedly improper limitation of defense counsel in the interrogation of a witness, a board member, concerning *alleged* Ku Klux Klan affiliations of the person, no longer a board member at the time, who had chaired the board at the time petitioner was placed in Class I–A on January 19, 1966 (A. 43, 71), was also held to be foreclosed.

SUMMARY OF ARGUMENT

I

Petitioner's failure to contest his I–A classification administratively until after he had been ordered to report for induction foreclosed him from challenging it at his trial.

A. Selective Service Regulation 1625.2 precludes a local board from reopening and reconsidering a registrant's classification upon the presentation of facts not previously considered after the issuance of an order to report for induction, unless there has been a change in the registrant's status resulting from circumstances beyond his control. This regulation is valid and necessary because if a registrant could wait, as petitioner did, until after he had been ordered to report for induction before seeking to change his I–A classification, the responsibility of local boards for meeting their draft call quotas would be seriously hampered and the Selective Service process itself placed in jeopardy. The plain purpose of the proviso is to preclude just such eleventh-hour efforts to seek reclassification as petitioner attempted in this case. Since the local board was precluded from considering the claims of occupational or hardship deferment because of petitioner's failure to seasonably present them, it would be particularly inappropriate for the courts to pass on the validity of these deferment claims, which are committed by statute to the discretion of the local boards.

B. The local board did not in fact continue to weigh and evaluate petitioner's draft status during the period after the mailing of the induction notice. There is thus no basis for petitioner's contention that the board *in effect* reopened his classification and thereby revived his right of administrative appeal. Moreover, since under Regulation 1625.2 the board was prohibited from reopening the classification after the issuance of the induction notice, there would be no basis for a claim of prejudice even if the board had in fact continued to evaluate his status on the basis of the information which he submitted. The record does show that the board gave careful attention to all of the information submitted on petitioner's behalf. But this suggests no more than that the board was scrutinizing the information, as it had the duty to do, to determine whether there had been a change of status resulting from circumstances beyond petitioner's control.

II

It was not error for the court of appeals to apply the exhaustion doctrine in this case merely because petitioner had not been specifically advised that his failure to exhaust administrative remedies would preclude him from challenging his classification in any future trial for refusal to submit to induction. The considerations governing the waiver of constitutional rights in criminal cases are not applicable in determining whether a registrant may be required to make

a timely presentation to the board of facts that may affect his classification. A deferment is not a matter of right but a matter of legislative grace. Indeed, the occupational deferment is established not to protect any interest of the registrant but rather to promote "the national interest." It was, therefore, reasonable for the President, in adopting the regulations, to conclude that it is more vital to the national interest that questions of classification be finally determined prior to the mailing of a notice of induction than that untimely claims to deferment be allowed.

Every registrant is warned, by notices appearing both on his registration and classification certificates, that he is required to notify his local board in writing of every change in address, physical condition, and occupational, marital, family, dependency, and military status, and of any other fact which might change his classification. The classification certificate further tells him that he must report each such change within ten days of its occurrence and explains his personal appearance and appeal rights. These warnings and this advice put registrants on adequate notice of the importance of the classification in the administration of the Selective Service System and of the need to observe the indicated time limits in contesting or appealing a classification.

III

A. Petitioner's failure to exhaust his administrative remedies with respect to the propriety of his I–A classification precluded his challenge to the indictment based on the alleged systematic exclusion of Negroes from his local board. For if he had seasonably pursued and fully exhausted those remedies he might have secured a change of classification and thereby obviated an induction order, and, thus, have rendered the discrimination issue moot.

B. Apart from exhaustion considerations, the challenge to the indictment is unsound on its merits.

In the first place, the record contains no evidence that Negroes were systematically discriminated against in the appointment of members to the board. The sole "factual basis" for the claim of discrimination was, and is, the stipulated fact that no Negro had served on the board for five years. During that period only nine persons served on the board. This number is too small, and the time interval involved too brief, for the absence of Negroes to have had statistical significance.

Moreover, the analogy which petitioner seeks to draw between juries and public administrative bodies like draft boards is inapt. The much smaller number of persons involved in service on draft boards as compared with the number involved in jury service, and the fact that Presidential discretion, rather than random methods of choice, is employed in the selection procedure, renders reliance on statistics as a basis for showing racial prejudice unwarranted. To show systematic exclusion of a racial group in the

exercise of the executive appointment power would require compelling the executive to testify as to his reasons for choosing certain individuals to serve and not others—an inquiry inappropriate under the doctrine of the separation of powers. The possible biases of the executive authorities in the naming of personnel to draft boards are no more subject to judicial scrutiny in the enforcement of board orders than would be like biases in the filling of vacancies in the Cabinet, on regulatory commissions, or on courts.

ARGUMENT

I

PETITIONER'S FAILURE TO CHALLENGE HIS I–A CLASSIFICATION ADMINISTRATIVELY UNTIL AFTER HE HAD BEEN ORDERED TO REPORT FOR INDUCTION FORECLOSED HIM FROM CHALLENGING HIS CLASSIFICATION AT HIS TRIAL

Petitioner's basic contention is that he was denied due process of law because he was precluded from asserting as a defense to the criminal prosecution that he had been improperly classified by his local board.[11]

[11] Although the district court did charge the jury that it was to determine whether petitioner's classification "was arbitrary and without any basis in fact", we believe that this instruction does not preclude petitioner from contending that he was prevented from challenging his classification at trial. The question of whether the classification was arbitrary was for the court and not the jury (*Cox* v. *United States*, 332 U.S. 442, 452–453) and there is here no indication that the court made an independent determination of the merits of petitioner's classification. Moreover, the instruction given the jury did not provide any standards by which it could determine whether the classification was arbitrary or unreasonable. Finally, the court of appeals based its decision solely on the ground that petitioner was precluded from challenging his classification because he failed to exhaust his administrative remedies.

Petitioner conceded at trial, however, that he had failed to advise the local board of the grounds for his claim of entitlement to an occupational or dependency deferment prior to the time he received his order to report for induction (A. 38). The regulations expressly provide that, in the absence of a change in circumstances beyond the registrant's control, the local board cannot reopen or reconsider a registrant's classification after he has been mailed a notice to report for induction (32 C.F.R. 1625.2, Appendix, *infra*, pp. 39–40). Thus, the court below properly determined that petitioner, by failing to make a timely report of a change in his circumstances, had failed to exhaust his administrative remedies and was, therefore, precluded from raising a challenge to the validity of his classification as a defense to the criminal prosecution.

In our brief in *McKart* v. *United States*, No. 403, this Term, we have set forth in detail the general considerations supporting the rule that a registrant who fails to exhaust his administrative remedies within the Selective Service System is not entitled to challenge the validity of his classification in defense of a criminal prosecution. (See Brief for the United States, *McKart* v. *United States*, No. 403, this Term, pp. 7–24.) We shall not repeat those arguments here but rely on our brief in *McKart*.[12] Here we will address ourselves to the validity of the regulation limiting the power of the local board to reopen or reconsider a registrant's classification after he has been mailed a notice to report for induction. We submit

[12] We are serving counsel herein with a copy of our brief in *McKart*.

that this regulation, which is vital to the orderly and effective administration of the Selective Service System, is constitutional and that the local board did not deny petitioner due process of law in refusing to reopen his classification to determine whether or not he was entitled to a dependency or occupational deferment. Finally, we submit that, if the local board acted properly in refusing to consider the merits of petitioner's claim of entitlement to a dependency or occupational deferment, then the court below was correct in holding that the courts should not review the correctness of petitioner's classification, since questions of deferment are entrusted to the discretion of the local boards.

A. THE REGULATION PROHIBITING THE LOCAL BOARD FROM REOPENING A REGISTRANT'S CLASSIFICATION AFTER HE HAS BEEN ORDERED TO REPORT FOR INDUCTION SERVES A VALID AND IMPORTANT PURPOSE IN THE SELECTIVE SERVICE SYSTEM AND PRECLUDES JUDICIAL REVIEW OF A CLAIM TO DEFERMENT WHICH IS BASED ON FACTS NOT SEASONABLY BROUGHT TO THE BOARD'S ATTENTION.

A Selective Service registrant has at his disposal a clearly defined procedure for seeking administrative correction of a classification believed to be erroneous when made.[13] Similarly, those like petitioner who claim that their classification has become inappropriate because of a subsequent change in circum-

[13] Thus, 32 C.F.R. 1624.1(a) provides the registrant with a right to a personal appearance before the board to discuss his classification if he files a written request for such appearance within thirty days of the mailing of the notice of classification (at the time petitioner was classified I–A the notice had to be filed within 10 days, 13 F.R. 4858–4859). The registrant is also entitled to appeal the decision of the local board either immediately or after he has had a personal appearance before the board. See 32 C.F.R. 1624.2(e) and 32 C.F.R. 1626.2.

stances have open to them administrative machinery to correct that classification.

Regulation 1625.1 (Appendix, *infra,* p. 39) states that "No classification is permanent" and provides that the registrant shall, within ten days after it occurs, report to the local board in writing any fact that might result in his being placed in a different category "such as, but not limited to, any change in his occupational, marital, military or dependency status, or in his physical condition." If notice to report for induction has not been mailed to the registrant and the new facts would, if true, justify a change in the registrant's classification, the board may reopen and reconsider the classification.. 32 C.F.R. 1625.2.[14]

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[14] If a registrant, *prior to his receipt of an order to report for induction*, requests that his classification be reopened on the basis of new information not previously considered, and the board decides not to change the classification, the question whether the registrant has the right to appeal from the board's decision depends on whether the board (1) declines to reopen the classification or (2) reopens and, after reevaluation, reclassifies the registrant in the same class he was in previously. Under 32 C.F.R. 1625.4, if the board is of the opinion that the information accompanying the request fails to present any facts in addition to those previously considered, or, even if new facts are presented, if the board is of the opinion that such facts, if true, would not justify a change of classification, it shall not reopen the registrant's classification, but shall merely advise the person filing the request that the information submitted does not warrant reopening and place a copy of the letter in the registrant's file. There is no right of appeal in such circumstances: If, however, the board reopens the classification on the basis of the new information, 32 C.F.R. 1625.11 provides that the board shall, after considering the information, again classify the registrant in the same manner as if he had

While the regulations provide the registrant with ample opportunity to contest the propriety of his classification, they do require prompt and seasonable action by the registrant. A registrant may not wait until he has been served with a notice to report for induction before he starts to seek a change of classification based on new information or a change in his circumstances. Under Regulation 1625.2, it is then too late. After the notice to report for induction has been mailed, the board is prohibited from reopening a registrant's classification unless it first specifically finds that there has been a change in his status resulting from circumstances beyond the registrant's control. In petitioner's case there was not only no such finding; there was no basis for making one. The board's refusal to reopen petitioner's classification during the period in which he and his mother and employer were seeking to induce it to do so was not due to arbitrariness or capriciousness, as petitioner argues (Pet. Br. 29–32).[15] Under Regulation 1625.2 the board was powerless to do otherwise.

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never been classified, and that such classification shall have the effect of a new and original classification even though the registrant is again placed in the classification he was in previously. In such event, a new right of appeal arises (32 C.F.R. 1625.13).

[15] Petitioner's assertions that the clerk of the board withheld from the board the reports of the oral information which petitioner and his mother had given her in their visits to the board's office commencing on April 15, 1966 (Pet. Br. 33), that *she* denied petitioner's request for a hardship deferment (Pet. Br. 33), and that the board delegated to her its responsibilities and, in general, exhibited laziness and indifference with respect to the powers and responsibilities it was supposed to be exercising over registrants' lives (Pet. Br. 34, 38) have no support in

The validity of that part of Regulation 1625.2 that precludes the local board from reopening or reconsidering the registrant's classification after a notice to report for induction has been mailed to the registrant has been repeatedly sustained as essential to the effective operation of the Selective Service System. *United States* v. *Gearey,* 368 F. 2d 144, 149 (C.A. 2); *United States* v. *Taylor,* 321 F. 2d 228, 230 (C.A. 6); *United States* v. *Beaver,* 309 F. 2d 273, 276–277 (C.A.

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the record. The suggestion that the clerk may have refrained from making available to the board her own reports of the oral information given her by petitioner and his mother appears to have no other basis than the fact that the minutes of the board meeting of April 27, 1966 (DuVernay Ex. 8, A. 83–85) do not refer to petitioner, whereas the clerk's letter of the 28th, purporting to have been written "by direction of the board," informed petitioner that the information which he and his mother had supplied had been considered by the board at its meeting of the previous evening (A. 85). As noted in the Statement, however, two board members testified that not everything that was discussed at board meetings was necessarily reflected in the general minutes of the meetings, and Board Member Bozonier, who participated in the consideration of petitioner's case at the April 27 meeting, testified to the existence in petitioner's individual file of a document which would attest to the fact that his case was discussed at that meeting (*supra*, p. 7, n 6). (The document which the member apparently referred to appears at A. 80.) Petitioner's allegation that the board delegated its responsibilities to the clerk is evidently based on the testimony of Board Members Lizana and Bozonier that it was customary for the clerk to "categorize" registrants prior to the board's voting on their classifications (A. 45, 53; see Pet. Br. 35, 37). The evidence showed, however, that the members would subsequently study the classification data and vote separately and individually on each case (A. 45, 46, 53). There is nothing in any of the excerpts from the testimony of members of the board to which petitioner refers (Pet. Br. 34–37) that gives support to any suggestion of impropriety or irregularity in the board's methods of operating.

4), certiorari denied, 371 U.S. 951; *Boyd* v. *United States,* 269 F. 2d 607, 609–610 (C.A. 9); *Keene* v. *United States,* 266 F. 2d 378, 381–384 (C.A. 10); *United States* v. *Schoebel,* 201 F. 2d 31, 32–33 (C.A. 7). The reason for the provision is clear. The issuance of a I–A classification is in the ordinary course of events followed by a direction to the registrant to report for induction—provided he passes the preinduction physical examination which he is directed to submit to in the interim. It is evident that, if every registrant who has duly received notice that he has been placed in Class I–A could legally wait until after he had received his induction notice before even beginning to challenge his classification, the responsibility of local boards for meeting their draft call quotas would be seriously hampered and the Selective Service process itself placed in jeopardy. The plain purpose of the proviso is to preclude registrants from attempting to delay their imminent induction by waiting until after they have been ordered to report for induction to present their claims for exemptions or deferments. The registrant's legitimate interests are, however, safeguarded by the clause which permits reopening of the classification after the mailing of the induction notice if the board specifically finds that there has been a change of status resulting from circumstances beyond the registrant's control.

If all registrants could wait until after they received their notice to report for induction to begin the administrative process for challenging their classification; the Selective Service System would have no way of assuring that it could meet the manpower

requirements of our armed forces for any given period. As the court noted in the *Keene* v. *United States,* 266 F. 2d 378, 384 (C.A. 10), the proviso is essential because without it "the whole machinery of the selective service process [might] conceivably be disrupted by last minute changes in status for purposes of avoidance." Or as the court in *United States* v. *Gearey,* 368 F. 2d 144, 149 (C.A. 2), observed:

> We can see no sound reason why a regulation may not require that claims for deferment should be advanced as soon as they have matured. If young men eligible for the draft are permitted endlessly to challenge their status and to claim review of adverse determinations, the effect on the Selective Service System would be chaotic for manpower quotas could rarely be met with any degree of certainty.

Since the part of Regulation 1625.2 precluding the local board from reopening or reconsidering a classification subsequent to the mailing of an induction notice is a reasonable and necessary part of the Selective Service process, it appears *a fortiori* that the courts should be precluded from examining the correctness of a registrant's classification on the basis of facts not seasonably brought to the attention of the local board. As this Court recognized only recently in *Clark* v. *Gabriel,* No. 572, this Term, decided December 16, 1968, the question whether a registrant is entitled to a particular deferment "involves a determination of fact and an exercise of judgment" which the statute has committed to the local board (slip opinion, p. 2). Indeed, the occupational and depend-

ency deferments which petitioner attempted to claim are matters which are peculiarly suited for determination by the local board. Regulation 1622.20 provides that "On the local board is placed the responsibility, under applicable rules and regulations, of deciding which men should be deferred because of their civilian activities." Similarly, the question whether a registrant's induction would work an "extreme hardship" on those who are dependent on him for support is one which clearly involves the weighing of a number of circumstances and one in which the local board's right "to request and receive information from local welfare and governmental agencies" (32 C.F.R. 1621.14) can play an important role. As Mr. Justice Harlan noted in his concurring opinion in *Oestereich* v. *Selective Service Board*, No. 46, this Term, decided December 16, 1968, "Classification is a highly individualized process in which a board must consider all pertinent information presented to it" (slip opinion p. 2). Thus, where the local board is precluded from reopening a classification because the registrant has failed to bring the relevant facts to the board's attention within the time specified by the regulations, the court should not attempt to determine for itself whether a defendant would have been granted a deferment had the local board been free to consider his claim. See *Estep* v. *United States*, 327 U.S. 114.[16]

[16] Since the board's action refusing to reopen petitioner's classification was taken pursuant to a valid regulation, there is no basis for petitioner's claim that he was thereby denied due process of law. Cf. *Evans* v. *United States*, 252 F. 2d 509, 512–513 (C.A. 9).

B. THE LOCAL BOARD DID NOT IN FACT CONTINUE TO WEIGH AND EVALUATE PETITIONER'S DRAFT STATUS DURING THE PERIOD THAT FOLLOWED THE MAILING OF THE INDUCTION NOTICE.

Petitioner argues that, despite Regulation 1625.2, the local board did in fact continue to weigh and evaluate his draft status during the period after the mailing of the induction notice (Pet. Br. 4, 26–32). He contends that the board, in permitting him, his mother, and his employer to present information to it in connection with their efforts to secure a change in his classification, and in giving "attention" and "consideration" (Pet. Br. 4, 26, 29) to the information and requests, *in effect* reopened his classification; and that, consequently, when the board refused the requests for deferment, it had the duty to notify him of the fact in the same manner as if it had initially reclassified him, thereby reviving his right of administrative appeal (Pet. Br. 26–27, 32). Cf. 32 C.F.R. 1625.11, 1625.12, and 1625.13; and see note 14, *supra*, pp. 20.

A short answer to this contention is that since the board was *prohibited* from reopening petitioner's classification after the issuance of the notice to report for induction by Regulation 1625.2 there can be no basis for a claim of prejudice. Any attempt by the board to evaluate petitioner's status would have been *ultra vires* and could not have conferred additional rights on petitioner. Cf. *Stain* v. *United States*, 235 F. 2d 339, 343 (C.A. 9).

In any event, the record contains no real support for petitioner's assertion that the board was reconsidering or reevaluating his draft status during the

period in question. The record does show that the board gave careful consideration to all the information that was submitted. But this suggests no more than that the board was scrutinizing the information—as it had the duty to do—to determine whether there was basis for a finding that there had been a change in status resulting from circumstances beyond petitioner's control. The board's letter to petitioner of April 28, 1966, stating that the information submitted by him and his mother had been "given careful consideration" (A. 85) does not imply that the board did more than to determine whether it reflected a change in circumstance over which petitioner had no control.

Neither is it relevant (see Pet. Br. 28–29) that other boards, at other times and places, may possibly have reopened registrants' classifications after issuance of an induction order under circumstances other than those permitted by Regulation 1625.2. That other boards may have ignored or overlooked the proviso of that regulation is plainly not a valid basis for challenging the action of petitioner's board in complying with the regulation's command.

II

THE LOCAL BOARD HAD NO DUTY TO SPECIFICALLY ADVISE PETITIONER THAT FAILURE TO PURSUE SEASONABLY THE ADMINISTRATIVE REMEDIES OPEN TO HIM WOULD PRECLUDE HIM FROM CHALLENGING HIS CLASSIFICATION IN ANY FUTURE TRIAL HE MIGHT UNDERGO FOR REFUSAL TO SUBMIT TO INDUCTION

1. There is no merit in petitioner's contention that it was error for the court of appeals to apply the exhaustion doctrine in his case because he was never

warned of the consequences of a failure to pursue his administrative remedies seasonably (Pet. 19–22; cf. Pet. Br. 12, 14, 24–25). The considerations governing the waiver of constitutional rights in criminal cases (see, *e.g.*, *Johnson* v. *Zerbst*, 304 U.S. 458, 464; *Carnley* v. *Cochran*, 369 U.S. 506, 512–516) are not applicable in determining whether a registrant may be required to make a timely presentation to his local board of facts that may affect his classification. A clear distinction is found in the fact that a deferment from military service is not a right of the registrant; it is a matter of legislative grace. See, *e.g.*, *Richter* v. *United States*, 181 F. 2d 591 (C.A. 9), certiorari denied, 340 U.S. 892; *Bradley* v. *United States*, 218 F. 2d 657 (C.A. 9), reversed on other grounds, 348 U.S. 967. Indeed, the occupational deferment which petitioner sought is not provided for the registrant's benefit, but rather, is provided to promote "the national interest" (32 C.F.R. 1622.20). Certainly, no right of the registrant is denied because the President in adopting the regulations has determined that it is more important to the national interest that questions of classification be finally determined prior to the time a notice of induction is mailed, than that the local board be free to consider even a legitimate claim to an occupational deferment after that date. Petitioner's reliance (Pet. 19; Pet. Br. 12) on such decisions as *Miranda* v. *Arizona*, 384 U.S. 436, is, therefore, clearly misplaced.

Every registrant is warned, by notices appearing both on his registration and classification certificates, that he is required to notify his local board in writing

of every change in address, physical condition, and occupational, marital, family, dependency, and military status, and of any other fact which might change his classification (see *United States* v. *O'Brien,* 391 U.S. 367, 374). The classification certificate also tells him—as does the related regulation, 32 C.F.R. 1625.1 (b) (Appendix, *infra,* p. 39)—that he must report each such change within ten days of its occurrence.[17] In addition, each registrant is given detailed advice concerning his right, within an indicated time limit, to request a personal appearance before the local board in regard to his classification, to appeal from the local board's decision in the matter, and, under specified conditions, to appeal further, if necessary, to the President.[18] The registrant is further advised, in boldface type, that "for information and advice" he should "go to any local board."[19] These warnings and this advice put registrants on adequate notice of the importance of the classification in the administration of the Selective Service System and of the need to

[17] SSS Form 110, revisions of May 7, 1963, January 25, 1966, and May 25, 1967.

[18] At the time petitioner was reclassified I-A this advice appeared on the postcard attached to the classification certificate by which the certificate was mailed to the registrant (SSS Form 110, revised May 7, 1963; see A. 19). The advice now appears on the reverse side of the classification certificate itself (SSS Form 110, revised May 25, 1967).

[19] When petitioner was placed in Class I-A this advice appeared on the classification certificate itself (SSS Form 110, revised May 7, 1963; *United States* v. *Miller,* 367 F. 2d 72, 75–76 (C.A. 2), certiorari denied, 386 U.S. 911). Commencing as of January 25, 1966, the instruction was printed on the postcard used to mail the certificate to the registrant (SSS Form 110, revised January 25, 1966).

observe the specified time limits in contesting or appealing a classification.

It is true that the classification certificate nowhere advises a registrant of the substance of Regulation 1625.2, under which local boards are prohibited from reopening a classification after an induction notice has been issued except on a finding of the special circumstances therein defined. It is obviously not practicable for the classification certificate (or any other document that is officially mailed to registrants) to refer to every regulation that might conceivably be important to a registrant. Due process does not demand the impossible or the impracticable. Regulation 1625.2, like every other Selective Service regulation, was of course duly published and promulgated in the Federal Register and petitioner was consequently as chargeable with knowledge of it as he was of the Selective Service Act itself. Cf. *Yakus* v. *United States,* 321 U.S. 414, 435; *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380, 384–385.

2. The instant record, moreover, contains substantial evidence that petitioner was not an ignorant or unsophisticated person who lacked knowledge of the importance of prompt action to contest a classification believed to be erroneous. The incident, referred to in the Statement, involving his erroneous placement in Class I–A in 1964, before he had completed high school, indicates his awareness not only of the proper procedure to be followed to correct such a misclassification but of the importance of promptness in the matter. Within four days of the mailing of the erroneous classification notice petitioner advised his

board by letter that he was still in high school, said he could produce written proof of the fact, and requested a personal appearance before the board to discuss the matter (*supra,* p. 3). This action by petitioner stands in significant contrast to his delay, following his reclassification into Class I–A in January 1966, until after he had been ordered to report for induction before he even began to challenge the classification. Petitioner's notification to his board in July 1965 that, although he had then completed high school, he was currently taking pre-college courses, planned to attend the University in the fall, and desired an extension of his student deferment to enable him to continue his education (*supra,* p. 4) is another incident indicating that petitioner was thoroughly aware of the importance of promptness in keeping the board advised of his circumstances.

III

PETITIONER WAS PRECLUDED UNDER THE EXHAUSTION DOCTRINE FROM CONTENDING THAT THE INDICTMENT WAS SUBJECT TO DISMISSAL ON THE GROUND THAT NEGROES HAD BEEN SYSTEMATICALLY EXCLUDED FROM HIS LOCAL BOARD, BUT IN ANY EVENT THE MOTION TO DISMISS WAS PROPERLY DENIED

At Point V in his brief, petitioner asks this Court to pass on the validity of his claim that the indictment against him should have been dismissed because Negroes were allegedly excluded from membership on his draft board. The questions presented in the petition for a writ of certiorari were limited, however, to issues concerning the exhaustion of remedies doctrine;

there was no reference to the claim that Negroes had been excluded from the local board. While petitioner did mention this claim in his Reply to the Memorandum for the United States in Opposition, petitioner never sought to amend his petition to include this claim. Since the question of the alleged exclusion of Negroes from the local board was neither "set forth in the petition" nor "fairly comprised" within the stated questions, it is not properly before the Court. Rule 23(1) of the Rules of this Court. *Irvine* v. *California,* 347 U.S. 128, 129. In any event, the claim is without merit.

At a hearing on petitioner's motion, evidence was adduced that eleven persons (including the five current members) had served on the board since 1948 and government counsel advised the court that no Negro had served on the board during the preceding five years. Counsel for petitioner was granted leave to establish through affidavit, if he could, that no Negro had ever sat on the board, but no such affidavit was ever filed. The district court, stating that it would assume that no current member of the board was a Negro (A. 9), denied the motion to dismiss without opinion. On appeal, the government stipulated that no Negro had been a member of the board for five years and petitioner accepted the stipulation as the factual basis for his renewed contention that it had been error not to dismiss the indictment. The court of appeals found it unnecessary to reach the merits of the contention because it concluded that petitioner was foreclosed from making it by his failure to exhaust administrative remedies. *Supra,* pp. 9–10, 11.

We submit, *first*, that the court of appeals was right in ruling that petitioner was precluded under the exhaustion doctrine from raising the issue of alleged discrimination against Negroes in the naming of members to his local board as a defense to his criminal prosecution, and, *second*, that the argument is in any event without substance on its merits.

A. PETITIONER'S FAILURE TO EXHAUST HIS ADMINISTRATIVE REMEDIES WITH RESPECT TO THE PROPRIETY OF HIS I–A CLASSIFICATION PRECLUDED HIS CHALLENGE TO THE INDICTMENT BASED ON THE ALLEGED SYSTEMATIC EXCLUSION OF NEGROES FROM HIS LOCAL BOARD.

We have argued above that petitioner, by his failure even to begin to challenge his I-A classification until after it was too late for him to do so under Regulation 1625.2, foreclosed himself from contesting the classification at his trial. *Supra*, pp. 16–24. Similarly, by failing to exhaust his administrative remedies with respect to his classification, petitioner also precluded himself from challenging the validity of the indictment on the ground of the alleged systematic exclusion of Negroes from his local board.

The only possible relevance of the charge of systematic exclusion of Negroes from petitioner's draft board must rest on a claim that the board's act of placing and maintaining petitioner in Class I–A was tainted by improper considerations relating to race. Since the order to report for induction normally follows in due course the issuance of a I–A classification, there is no basis for distinguishing between the board's act of classifying petitioner I–A and its ordering him to report for induction. Indeed, petitioner

has at no time suggested in these proceedings that he had grounds for disobeying his induction order independent of those he had for challenging his I–A classification. Since the board was precluded under Regulation 1625.2 from considering the merits of petitioner's claim to either an occupational or hardship deferment because the facts relating to these claims were not brought to the board's attention prior to the time a notice to report for induction was mailed to petitioner, it is impossible to see how petitioner could have been prejudiced by the racial composition of the local board.

Moreover, under the principles set forth in *Falbo* v. *United States,* 320 U.S. 549,[20] petitioner's failure to exhaust his administrative remedies was properly held to preclude him from challenging the racial composition of the board. In so far as the application of the exhaustion doctrine is concerned, it can make no difference whether the reason for the challenge is that the board acted capriciously and arbitrarily in issuing the classification (the usual ground of such challenges) or that the board, for reasons of racial prejudice, declined to grant the registrant a deferment which it might otherwise have seen fit to bestow (the claimed situation here).

It is evident that if petitioner had seasonably initiated and fully exhausted his administrative remedies he might never have been faced with an induction order—since he might have procured a change of classification from his local board, the appeal board, or

[20] See our discussion in our brief on the merits in the *McKart* case, No. 403, this Term, pp. 25–30.

the President. One of the practical considerations underlying the exhaustion doctrine is that of minimizing the amount of litigation in the courts by giving administrative agencies the opportunity to correct errors through the administrative process. Thus, petitioner was properly precluded from making *any* challenge to his classification which might otherwise have been available, including the claim that it was racially motivated.

This is not to say that petitioner was required, as part of the process of exhausting his administrative remedies, to raise the issue of the alleged exclusion of Negroes from the local board before the board itself in the first instance. We suggest only that petitioner, by failing to exhaust his administrative remedies *with respect to his classification,* foreclosed himself from raising the discrimination issue in the courts—because if he had duly pursued and fully exhausted his administrative remedies respecting his classification he might in due course have secured a change of classification, have thereby obviated an induction order, and thus have rendered the discrimination issue moot. This point was recognized by Mr. Justice Harlan in his concurring opinion in *Oestereich* v. *Selective Service System,* No. 46, this Term, decided December 16, 1968, when he said (slip opinion, pp. 6–7, n. 7):

> * * * As I have discussed in the preceding text, the boards can provide no remedy for a registrant's claim that the regulations or statutes are themselves invalid. (*This is not to say that a registrant making such a claim may come into court before he has exhausted his adminis-*

trative appeals, for the System may decide in his favor on other grounds, obviating the need for further review. * * *) [Emphasis added.]

Cf. *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U.S. 752, 771–773.

B. ON ITS MERITS, THE CHALLENGE TO THE BOARD'S COMPOSITION IS UNSOUND.

1. A formally sufficient answer to petitioner's claim relating to the board's allegedly racially tainted composition is that the record is bare of evidence that Negroes were systematically discriminated against in the appointment of personnel to the board. Cf. *United States* v. *Prince,* 398 F. 2d 686, 688 (C.A. 2), certiorari denied, 393 U.S. 946. The sole "factual basis" for the claim of discrimination was, and is, the fact, stipulated by the government, that no Negro had served on the board for five years. During that five-year period a total of only nine persons sat on the board, including the five incumbents (A. 5–6). These facts do not constitute even the beginning of a showing of systematic exclusion or discrimination. The total number of members was too small, and the time interval involved too brief, for the absence of Negroes to have had statistical significance. Cf. *Whitus* v. *Georgia,* 385 U.S. 545, 552. Proof that racial discrimination was practiced in the appointment of personnel to public bodies like draft boards requires more than the making of mere conclusory assertions that such discrimination occurred. Cf. *Richardson* v. *Rivers,* 335 F. 2d 996, 999 (C.A.D.C.).

2. Even if it be assumed, *arguendo,* that Negroes were discriminated against in the naming of members

to petitioner's draft board, the fact would be without legal relevance in the context of a prosecution for refusal to obey a board order. *Clay* v. *United States,* 397 F. 2d 901, 909–913 (C.A. 5), petition for certiorari pending, No. 271, this Term; *Sumrall* v. *United States,* 397 F. 2d 924, 926 (C.A. 5), certiorari denied, December 9, 1968, No. 711 Misc., this Term; *United States* v. *Prince,* 398 F. 2d 686, 688 (C.A. 2), certiorari denied, 393 U.S. 946; *Haven* v. *United States,* 403 F. 2d 384, 386–387 (C.A. 9), petition for certiorari pending, No. 1343 Misc., this Term; *Nelloms* v. *United States,* 399 F. 2d 295 (C.A. 5), certiorari denied, No 781 Misc., this Term, January 27, 1969; cf. *United States* v. *Richmond,* 274 F. Supp. 43, 60 (C.D. Cal.). The analogy which petitioner seeks to draw between juries and public administrative bodies such as draft boards is inapt. *Haven* v. *United States, supra.* The right to a trial in a criminal case by a jury chosen from a cross-section of the community is guaranteed by the Constitution. A large part of the community has the right and the duty to serve on juries so that the constitutional mandate for a jury representing a fair cross-section of the community may be satisfied. In contrast, the members of local Selective Service boards are selected by the President from persons recommended by the Governors of the States in which they serve; their only prescribed qualifications are that they be civilian citizens, residents of the counties in which they serve, and between 30 and 75 years of age (50 U.S.C. App. 460(b)(3); 32 C.F.R. 1604.52). The number who serve is, in com-

parison to the number serving on juries, very small. The limited numbers involved and the fact that Presidential discretion, rather than random methods of choice, is involved in the selection procedure renders reliance on statistics as a basis for showing racial prejudice unwarranted.

To prevail here, the petitioner would have to show that there was in fact racial discrimination in the operations of this local board. The record is completely bare of any evidence to this effect. Thus the petitioner's argument falls for a complete failure of proof.

If all of the members of a given local board meet the qualifications prescribed in the law and regulations, there is no valid legal basis for allowing judicial challenges to the board's composition solely on the ground that racial or religious considerations may have entered into the appointing authorities' decision as to who shall serve. The possible prejudices and biases of the appointing authorities are no more subject to judicial scrutiny and supervision in the enforcement of the orders of the board than would be like biases in the filling of vacancies in the Cabinet, on regulatory commissions, or on courts. As the court observed in *Haven* v. *United States, supra,* 403 F. 2d at 386–387:

> * * * We find no support in administrative law or in constitutional law for a contention that the composition of the membership of an administrative board, comprised under laws which are not themselves void for constitutional infringement, may be attacked by showing that certain groups or classes of persons, racial, religious or

otherwise, have never been privileged to serve on such a board. We see no fair analogy between the composition of a jury, required by the Sixth Amendment to be fair and impartial, where systematic and deliberate exclusion of classes of persons will destroy the constitutional qualification of the tribunal, and the composition of an administrative board in the executive department of the Government.

* * * * *

We find nothing in the requirements of the law and regulations which can be characterized as invidiously discriminatory. Accordingly, if the local board members have been appointed by the President upon the recommendation of the Governor, and each member meets the requirements of the law and regulations, no further attack upon the composition of the board may be entertained. The mental processes, prejudices and biases of the appointing authorities are not a subject of judicial scrutiny and supervision.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 1969.

APPENDIX

Selective Service Regulations 1625.1 and 1625.2 (32 C.F.R. 1625.1 and 1625.2) provide in pertinent part:

§ 1625.1 *Classification not permanent.*

(a) No classification is permanent.

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof.

* * * * *

§ 1625.2 *When registrant's classification may be reopened and considered anew.*

The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a

registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) * * * unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

DuVERNAY *v.* UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 814. Decided March 24, 1969.

PER CURIAM.

The judgment is affirmed by an equally divided court.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.